No. 14,884

In the

United States Court of Appeals

For the Ninth Circuit

COMMODITY CREDIT CORPORATION,	
	Appellant,
vs.	
ROSENBERG BROS. & CO. INC., a Corporation,	
	Appellee,
and	
ROSENBERG BROS. & CO. INC., a Corporation,	
	Appellant,
vs.	
COMMODITY CREDIT CORPORATION,	
	Appellee.

Reply Brief for Rosenberg Bros. & Co. Inc.

Appeals from the United States District Court for the Northern District of California—Southern Division.

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STATEMENT OF THE CASE

Appellant's statement of fact is neither complete nor accurate and requires a further exposition of the events which gave rise to this suit.

This case arose out of the sale in 1947 of 14,330 tons of processed raisins by Rosenberg Bros. & Co.* (hereinafter referred to as Rosenberg), a California dried fruit processor, to Commodity Credit Corporation† (hereinafter referred to as CCC) and the subsequent conduct of CCC and its officials which increased Rosenberg's cost of acquiring raisins to cover its sales to CCC. The complaint contains two causes of action, one based on the violation by CCC of its express contractual commitments (not to purchase in excess of 61,000 tons of 1947 crop Thompson seedless raisins, to purchase only from packers and processors and not from producers, and not to provide price support at any given level), and the other based on violation of CCC's implied contract not to hinder Rosenberg's performance or render it more difficult or expensive. The District Court gave judgment for plaintiff on the basis of CCC's breach of its implied agreement.

In 1947 when plaintiff's causes of action arose, CCC was a Delaware corporation, all the stock of which stood in the name of the United States (Def. Ex. AJ; Title 15 U.S.C. 713, 713a-3). In making the raisin purchases in question, CCC acted as an instrumentality of the Department of Agriculture, and utilized the personnel of the Production and Marketing Administration (hereinafter referred to as PMA). PMA and CCC were closely connected and many PMA officials also served as functionaries of CCC. Clinton Anderson, for example, was not only Secretary of Agriculture, but also held the position of Chairman of the Board of CCC (11 Fed. Reg. 177A-242 § 200.4), exercised all rights of stock ownership in CCC on behalf of the United States (11 Fed. Reg. 177A-242 § 200.3) and supervised and controlled all operations of CCC (Def. Ex. AK § 15(a); 11 Fed. Reg. 177A-242 § 200.1; Reor-

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*Plaintiff is a Maryland corporation which succeeded to Rosenberg's claim against CCC.

†Defendant is a federal corporation which succeeded to all the assets and assumed all the liabilities of CCC, a Delaware corporation.

ganization Plan No. 3, Part V § 501). The Administrator of PMA was also President and a director of CCC (11 Fed. Reg. 177A-242 §§ 200.4, 200.5). The directors and vice presidents of CCC also served as top officials of PMA (11 Fed. Reg. 177A-242 §§ 200.4, 200.5; Def. Ex. AK §§ 12(a), 20). Plans for dried fruit purchase programs were formulated and administered through the Fruit and Vegetable Branch of PMA, but all such plans were subject to the approval of CCC and the Secretary of Agriculture, and were formally adopted by the Board of Directors of CCC. Purchases were actually made by officials of the Fruit and Vegetable Branch of PMA, but they acted in their capacity as contracting officers of CCC (11 Fed. Reg. 177A-242 § 200.8; Def. Ex. AK § 28(a); Title 7 C.F.R. (1946 Supp.) Ch. XXI, Subch. C § 2301.1(d)(4), 2301.10, 2305.14).

On or about July 25, 1947, representatives of the raisin industry in California, through an industry committee, in which Rosenberg employees and officials of the Department of Agriculture participated, estimated that the surplus of 1947 crop Thompson seedless raisins would be 100,000 tons (Pl. Ex. 3; R. 155 et seq.*). This was a conservative (i.e. low) figure based on "a hopeful expectation" of domestic and export sales (R. 157). Copies of this report were sent to interested parties, including the Fruit and Vegetable Branch of PMA in Washington, D. C., and its local office in Berkeley, California (R. 157). S. R. Smith, head of the Fruit and Vegetable Branch, testified that he was aware of this estimate in August, 1947 (R. 530), and Secretary Anderson admitted his knowledge of this estimate in September; but from the content of his remarks, he must have meant early August, 1947 (R. 353-354). The Department of Agriculture itself, as early as July, 1947, estimated the 1947 industry surplus of Thompson seedless raisins as 100,000 tons or more (R. 482).

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*References to the printed record will be designated in this manner.

In early August, 1947, both S. R. Smith and Secretary Anderson met with packer and grower groups in California and discussed CCC's projected 1947 raisin purchases. Smith had previously been informed by the Board of CCC, to guide his discussions in these meetings, that CCC did not plan to underwrite any dried fruit crop at a specified price level, but that it did anticipate purchasing dried fruit for foreign relief needs, schools and institutions, and hoped to use its funds to encourage exports (R. 488). Smith told both growers and packers that the Department was willing to consider acquisition of raisins for distribution to schools and institutions, for foreign relief feeding and for human consumption in occupied areas, as well as the use of its funds for a commercial export program, but that it would not undertake a price support program underwriting prices at any given level (R. 490-493).

At a press conference immediately after a luncheon held in Fresno on August 4, 1947, Secretary Anderson stated his determination not to support prices for dried fruits as he had in the case of potatoes. He did not want to be accused of wasting products, and would take no more dried fruit than could be used in three ways: "(1) by the school lunch program; (2) by the program of regular shipments to our Armed Forces and those countries over which the American flag was flying abroad; and (3) by subsidizing export into the Northern countries where dried fruits are a very important part of their diet and a very valuable part of their diet" (R. 354-355). In a speech broadcast over the radio the same day, Secretary Anderson reiterated these views, adding that he would not duplicate the potato program in the dried fruit industry by underwriting prices at any fixed level, and warning the industry that the contemplated program offered a decidedly limited outlet for dried fruit (R. 356-357; Def. Ex. E). At other discussions with farm groups, Anderson even suggested destruction of surplus raisins, and told them that the Department would take surplus raisins only at prices at which they would move into coun-

tries where foreign exchange was a problem, and at prices at which CCC could resell raisins to the Army, which was at the time "somewhat of a tough trader" (R. 360). These preliminary discussions of Smith and Anderson with industry groups in California could not fail to create the strong impression that CCC would acquire only so many 1947 crop raisins as it could dispose of for certain specific purposes; that CCC would acquire these raisins only at prices low enough so they could be resold to "tough traders"; and that CCC would not support prices at any given level.

The program originally adopted by CCC confirmed these early impressions. S. R. Smith, in August, 1947, submitted a dried fruit program, prepared in his branch, to the Board of Directors of CCC. This program was known as Docket OC-95a and covered the entire 1947-1948 crop year (R. 161, 539-540; Pl. Ex. 5).* The rules of the Department of Agriculture required secrecy with regard to the contents of Docket OC-95a, and, to Smith's knowledge, neither Rosenberg nor any other packer had access to the docket (R. 163-166). The economic factors on which Smith's proposals were based were contained in a statement of supporting data in the docket. This statement confirmed the industry's estimate of a surplus of 100,000 tons of Thompson seedless raisins.†

Smith's docket provided for purchase of a maximum of 133,000 tons of dried fruits, and Smith recommended that this total include no more than 61,000 tons of raisins (R. 504, 538). The docket stated that the purchase program recommended would enable the *dried fruit industry* to establish prices commensurate with the remaining supply and corresponding market demand. All dried

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*While Smith's original recommendation to the Board of CCC also contained an export subsidy program, the Board failed to adopt that part of the proposal and the trial court struck Smith's testimony regarding it (R. 505-506). The docket which the Board adopted is Plaintiff's Ex. 5 (R. 163).

†The docket showed an estimated surplus of 98,000 tons *processed weight*. On the basis of the accepted 6% shrinkage factor (to allow for stemmer waste in processing), this represents approximately 104,000 tons of natural condition raisins.

fruits acquired under this program were to be received by or for the account of CCC, and were to be disposed of by sale or other means in certain stated channels. The program was designed to operate through dried fruit *packers* rather than by direct CCC purchase from growers because of the packers' greater experience in field buying. The purchase program was based on *competitive bidding* by packers rather than on negotiated prices or prices fixed at arbitrary levels. The stated purpose of this method of purchase was to enable CCC to reap the advantage of the accumulated marketing experience of the entire group of growers and packers in establishing price levels necessary to move available supplies into prompt consumption.

Docket OC-95a carried an endorsement by the Acting Solicitor of the United States Department of Agriculture to the effect that all purchases by CCC would be made on an "offer and acceptance basis."* The Acting Solicitor then stated:

> "We understand that 'offer and acceptance basis' as used in the docket refers to a method of sale which involves (1) the issuance of an announcement that Commodity Credit Corporation desires to purchase certain commodities or that Commodity Credit Corporation makes commodities available for sale, such announcement either to specify prices or to call for bids from the public which will specify prices, (2) offers from the public made *on the basis of such an announcement,* and (3) acceptance by Commodity Credit Corporation of those offers which are *most favorable to the Government.* Sales on a 'negotiated basis' are negotiated with particular buyers without an announcement having been made to the public." (Emphasis added.)

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*The provisions for competitive bidding and for disposition of raisins acquired by CCC in limited outlets, as well as the Acting Solicitors statement, reflect Secretary Anderson's preliminary comments that CCC would buy only so many raisins as it could dispose of in certain designated channels at prices which would enable it to resell at unfavorable exchange rates in foreign countries and to the Armed Services which were at the time "somewhat of a tough trader."

After approval of Docket OC-95a by the Board of Directors of CCC, Secretary Anderson, the Chairman of the Board of CCC, on September 5, 1947, made an announcement to interested packers and growers and to the public of the general outline of the dried fruit purchase program embodied in Docket OC-95a (R. 167-169). This announcement took the form of a written release to the press (Pl. Ex. 4) in Albuquerque, New Mexico, and was later distributed by mail to interested persons in the industry, including Rosenberg (R. 158). This announcement was not a mere "off-the-cuff" remark to the press. It was a carefully worded and well-drafted document and was the only announcement to the industry of the *general outline* of CCC's 1947 purchase program (Finding 12). The circumstances surrounding its issuance emphasize that its purpose was to enable the industry to "make its plans" and that it was intended that the industry should rely on its terms. The docket itself (Pl. Ex. 5) stressed the importance of early positive action and immediate announcement of CCC's 1947 purchase program to the industry "to avoid serious and unnecessary price decline." The September 5 announcement originated in the Fruit and Vegetable Branch of PMA, and S. R. Smith, head of the branch, forwarded it to his superiors for their approval (R. 550-551). The draft of this announcement eventually reached New Mexico in the hands of Jesse Gilmer, President of CCC. Secretary Anderson testified that he met at Albuquerque, on September 5, 1947, with Nathan Koenig, his administrative assistant, Jesse Gilmer, Mr. Trigg, an Administrator of PMA, and others; that they then acquainted him with Docket OC-95a, and also presented him with the prepared text of an announcement of the program embodied in the docket (Pl. Ex. 4; R. 361-362; 425). After editing (R. 425), the announcement was given to the newspapers in typewritten form (R. 395).

The announcement confirmed the preliminary statements of Smith and Anderson as to the nature of CCC's 1947 dried fruit

activities. It stated that "Commodity Credit Corporation will purchase *up to* 133,000 tons of dried apples, dried peaches, dried prunes and raisins if the purchase of this total quantity of dried fruits is necessary to provide outlets for the relatively large 1947 production." (Emphasis added) It continued in the following words:

> "The *maximum limit* of 133,000 tons is divided into purchase of 2,250 tons of dried apples, 3,750 tons of dried peaches, *61,000 tons of raisins,* and 66,000 tons of dried prunes.
>
> "Purchases of dried fruits under the program will be made from *processors and packers* of dried fruits. An announcement will be issued soon inviting *packers* to submit offers on a portion of the quantity to be purchased.
>
> * * * * * * *
>
> "The purchase program *does not provide price support at any given level,* but is expected to result in reasonable prices to producers and consumers. * * *" (Emphasis added.)

At the time of the announcement, packers were in a short position because at that time it was so early in the season that 1947 crop raisins were not yet made (R. 103-105). Growers are always reluctant to sell before their raisins are boxed and they know what their crop is (R. 202, 342), and packers always try to buy well-cured raisins so that they will not have to redry them (R. 105). S. R. Smith recognized that the bids made under the September 5 announcement came at a time when packers would not normally have sufficient raisins to cover the bids (R. 563-564). This situation was particularly acute in 1947 because of grower resistance to selling created by the confused market situation (R. 183, 203-204).*

*Growers, under the leadership of Setrakian (head of the Raisin Producers Association) were holding raisins for parity or 90% of parity, i.e., $150-$160 per ton (R. 573-575).

The obvious effect of the program announced on September 5, a program designed to remove by competitive bidding only 61,000 tons of an indicated surplus of 100,000 tons or more, was to depress prices. Dwight Grady (an expert on the California dried fruit situation, who in 1947-1948 was a Vice President of Rosenberg, but who is no longer in Rosenberg's employ) testified that its depressing effect was even more marked because the bidding proceeded in two stages, and those bidders who had been unsuccessful in the first stage were expected to and did bid lower on CCC's second call (R. 173-176).*

Grady, acting on behalf of Rosenberg, with the concurrence of several other packers, conveyed his views about the shortcomings of the announced program to CCC and Department of Agriculture officials. When Grady first learned of the raisin program, on Saturday, September 6, 1947, he immediately called Erwin Graham, head of the Special Crops Division of the Fruit and Vegetable Branch, and pointed out the insufficiency of the program announced, as well as its price depressing effects (R. 173-175). Before Rosenberg made its first bid under the program, Grady spoke with other officials of the Department of Agriculture, and again indicated the inadequacy of the program, suggesting purchases at a fixed price to counteract the price depressing effect of the anouncement (R. 177). Admittedly, Rosenberg's activity was not entirely altruistic. It was to its interest as well as to the interest of growers to have a workable program based on reasonable prices to growers. Grady stated that packers do not fare nearly so well in times of grower distress as they do in times of grower prosperity, and that Rosenberg's aim was to bring about stability in the raisin industry (R. 184, 208-209).

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*The trial court resolved any conflict of testimony on the effect of CCC's 1947 raisin purchase program, as announced September 5, 1947, by confirming Grady's expert opinion as to its effect (Finding 16).

On September 9, 1947, Grady, with the concurrence of other leaders in the industry, sent a telegram to Smith, suggesting the use of a Webb-Pomerene technique—purchase of raisins for export at fixed prices—to alleviate the bad situation created by the program announced (Pl. Ex. 6). The telegram was followed on the next day by a letter (Pl. Ex. 7) explaining Grady's suggestion. Both the telegram and the letter informed Smith that packer offerings of raisins to CCC under its announced program would be substantially short sales, because commercial handlers had been unable to contract new tonnage, which approximated two-thirds of the total crop.* Smith admitted that he had no reason to question Grady's statements about the packers' short position (R. 559), and that even apart from any specific notice, the general situation indicated that packer offerings under CCC's first call for bids on raisins were in excess of their purchases (R. 577). Therefore, if and when CCC accepted these bids, packer sales would necessarily have been "short sales".

Smith's answer to Grady's letter and telegram was sent by telegraph on September 12, 1947 (Pl. Ex. 8). The Secretary had already stated in his Fresno speech in August and in the announcement issued September 5, 1947, in Albuquerque that dried fruit prices would not be supported at a fixed level. Smith, in answering Grady, declared that Grady's suggestions were contrary to the Secretary's statements, and continued:

> "The program as announced is substantial contribution toward stabilized conditions within Dried Fruit Industry. We solicit and expect receive cooperation Rosenberg and other packers in making it a success."

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*Grady testified that the remaining one-third of the crop was produced by grower-members of Sun Maid, the raisin growers' cooperative which had no problem of acquiring raisins (R. 182), and that his reference to two-thirds of the crop in the telegram meant that portion of the crop handled by independent processors (R. 186-187).

The purport of these words is clear: The announcement is *the* program, and the program will not be changed in any manner contrary to the announcement. Grady regarded Smith's telegram as a final decision of the Department against any change in the program as announced and as a declaration that offers would be received on the conditions contained in the announcement (R. 194). Rosenberg then determined to bid on a realistic basis to get the business (R. 194-195).

CCC's first call for bids on raisins pursuant to the announced program was dated September 10, 1947 (Pl. Ex. 9), and invited offers for sale to CCC of up to 30,000 tons of raisins. On September 17, 1947, Rosenberg offered to sell CCC 6,000 tons at a price of $151 per ton and 4,000 tons at a price of $152 per ton. This offer was made on a mimeographed bid form supplied by CCC (Pl. Ex. 10), and was accepted on or about September 23, 1947 (Pl. Ex. 11, 12). At the time of this call CCC purchased 30,000 tons from Rosenberg and other packers. Rosenberg's bid was low, and Sun Maid, the raisin growers' cooperative, was second low at a price only slightly in excess of that offered by Rosenberg (Pl. Ex. 54). The interrelationship of this purchase and the program announced September 5, 1947, are accentuated by the Department's own announcement of the purchase (Pl. Ex. 13), which characterizes it as a purchase "under the program announced by the Department September 5, 1947."

CCC's second call for bids (Pl. Ex. 14) invited offers on the remaining 31,000 tons of raisins comprising the 61,000 tons referred to in the September 5 announcement. Rosenberg submitted an offer for 10,000 tons on CCC's mimeographed bid form (Pl. Ex. 15), but only 4,330 tons of its offer were accepted. The acceptance was by night letter dated October 13, 1947, which was received by Rosenberg on the morning of October 14 (Pl. Ex. 16; R. 215-216).

Rosenberg was the *high* bidder ($149.40 per ton) among those packers whose offers were accepted on CCC's second call. Sun

Maid, the grower cooperative, bid $145.48 per ton. All bids accepted were lower than the lowest bid made under Announcement No. 1 (Pl. Ex. 54).

At the time when CCC accepted Rosenberg's two bids, its officials knew that all independent packer sales to CCC under Announcements No. 1 and No. 2 were short sales, which independent packers would have to cover by field purchases at a later date (Finding 21).

In its brief, Appellant repeatedly makes the unfounded charge that Rosenberg bid below the market in its sales to CCC, gambling on a decline in market price. Such is not the fact. The raisin market had been falling ever since announcement of CCC's program on September 5. On the morning of September 8, 1947, the price of packed processed raisins dropped from $.095 per pound to $.085 per pound and by the time bids were submitted under Announcement No. 1, had further declined to $.08 per pound (Pl. Ex. 21; R. 182-183). Substantially all trading in raisins prior to the receipt of bids under Announcement No. 1 was for early season delivery (Def. Ex. K). Such early deliveries command premium prices and cannot be compared with general sales which normally commence in early October (R. 105). What then was the market at the time bids were made to CCC? The court found that the accepted "spread" between the price of packed processed raisins and natural condition raisins was slightly in excess of $40 per ton and that offers by independent packers and Sun Maid under Announcements No. 1 and No. 2 reflected a field price of approximately $110 per ton (Finding 23). What better evidence of the field market could there be than Sun Maid's sale of 20,000 tons of raisins to CCC (Pl. Ex. 54)?* Sun Maid is a grower cooperative and its sales to CCC are the best available indication of the growers' opinion of "the market." Rosenberg did not relish

*These sales were made at the following prices: 10,000 tons at $153.33 on September 24, 1947 reflecting a field price of $113.33, and 10,000 tons at $145.48 on October 14, 1947, reflecting a field price of $105.48.

the short position which was forced upon it and objected vociferously (R. 384-385), but felt that its position in the industry necessitated its cooperation with the Department if surplus conditions were to be alleviated (R. 198-200).

Because of the soft market conditions resulting from CCC's announced program, radio and press protests resounded throughout the San Joaquin Valley. The Department refused to change its announced program in spite of grower and packer protests. A mass meeting of thousands of producers was held in the Fresno Auditorium, at which Setrakian urged growers not to sell and Sheridan Downey, then U. S. Senator from California, and others promised to intervene in Washington (R. 112-113, 203-205).

Downey did intervene with CCC officials in Washington in early October, 1947. He testified that at his meetings, he was informed by them of the "low and favorable bids" they had received from packers who had offered raisins on the basis of the original purchase program. They recognized that packers had sold short and would be faced with heavy deficits if the purchase program were increased. Downey suggested releasing the packers from their bids, but, while Board members recognized the inequity of holding packers to their low bids, they told him that the Secretary of Agriculture was very happy about the contracts with packers and did not want to "let the packers out" (R. 115-119). Downey was informed a few days later that Secretary Anderson had rejected the unanimous recommendation of the Board of CCC to purchase an additional 60,000 tons of raisins. Downey then appealed to the President for aid (R. 119-122).

On October 9, 1947, while the bids of packers (including Rosenberg) made under Announcement No. 2 were still pending, CCC planned a complete revision of its raisin program but gave no notice of that change to anyone outside the Department of Agriculture. This change was made with the knowledge that it would catch the packers whose bids had been accepted by CCC in a

squeeze (R. 144-148). CCC nevertheless accepted the pending bids by night letter sent on October 13, 1947 (Pl. Ex. 16) and received by the packers on October 14. After it had contractually bound these packers to their low bids in this manner, on October 14, 1947, CCC announced changes in its program, the inevitable and planned effect of which was to increase the field price of raisins to these very same packers who had sold short to CCC (Findings 25, 26, 27, 28, 29, 30, 34).

This really shocking conduct of CCC is confirmed by the record. On October 9, 1947, the CCC Board in secret session adopted a resolution (Pl. Ex. 5; Def. Ex. M) "to increase the maximum quantity of raisins purchased to 121,000 tons." This change was not disclosed until October 14, 1947, after the low packer bids received under Announcement No. 2 had been accepted. Only then did the Department of Agriculture make public the changes in CCC's 1947 raisin purchase program (Pl. Ex. 19). The changes announced were even more drastic than the resolution adopted by the Board of Directors on October 9 indicated. The announcement not only invited offers for an additional 60,000 tons of raisins, but it requested offers to CCC from raisin producers and others in physical possession of raisins, thus putting CCC into direct competition with packers (who had not yet covered their prior commitments to CCC) for raisins in the field.* Further details of the changes in CCC's purchase program were announced on October 17, 1947 (Pl. Ex. 25).

The net result of these drastic changes was to put CCC in the market for the *entire* raisin surplus. (121,000 tons even exceeded earlier surplus estimates.) Rosenberg and other packers had based

*It is also worthy of mention that the Department's October 14 announcement (Pl. Ex. 19) declared that CCC had bought 31,000 tons of Thompson seedless raisins, and that a grand total of 112,568 tons of dried fruits had been purchased from processors and packers "since *offers to purchase* were originally announced by the Department on *September 5*." (Emphasis added.) This is but a further illustration that the September 5 announcement was made to be relied upon and acted upon by processors and packers.

their bids on a program which was to take only 61,000 tons out of an indicated surplus of 100,000 tons, leaving an estimated surplus of some 40,000 tons overhanging the market. By the announced changes, CCC also put itself into direct competition with packers (who, as CCC knew, were in short position on their prior sales to CCC) to obtain natural condition raisins from producers.

Immediately upon learning of the changes in CCC's raisin purchase program, on the morning of October 14, Rosenberg sent a telegram to Clinton Anderson (Pl. Ex. 17) requesting cancellation of its two contracts with CCC (Finding 31). This telegram declared that Rosenberg's sales to CCC had been made in reliance upon the Secretary's announcement of September 5 and upon the stated limits on quantities to be purchased, and that Rosenberg had taken into consideration the known size of the 1947 raisin crop, the Secretary's declaration that no support price would be established, the Department's request for Rosenberg's cooperation, and the need for re-establishing domestic consumption in reasonable volume. Rosenberg also referred to the short position of itself and other processors, and mentioned the repeated insistence of Department officials that there would be no change in the raisin purchase program as announced. This telegram was supplemented on the following day by a further telegram informing Secretary Anderson that Rosenberg was willing to cancel all of its existing *grower* contracts for raisins that called for firm prices of less than $140 per ton (Pl. Ex. 18). Cancellation of these contracts would have enabled the released *growers* to enjoy the benefits of CCC's new program.

Secretary Anderson testified that he referred these telegrams to the Fruit and Vegetable Branch and to his legal advisor for report (R. 402). The report (Pl. Ex. 50) which finally reached the Secretary's hands was made by S. R. Smith, Director of the Fruit and Vegetable Branch of PMA. Smith was the author of the dried fruit docket, and his branch was in charge of CCC's purchases

under it. Perusal of his report discloses that the Department was well aware of the packers' short position at the time it changed CCC's 1947 raisin purchase program. Mr. Smith also recognized that the announced changes had materially interfered with packer efforts to cover their CCC commitments as trading in raisins had been practically at a standstill since the October 14 announcement, and growers were not inclined to sell to packers in view of the impending purchase of raisins by CCC *directly from growers.* Smith pointed out that processors whose offers had been accepted by CCC

> "feel that the Department has not dealt fairly with them because of accepting the offers submitted at low prices based upon a CCC purchase of 61,000 tons, and immediately thereafter putting a squeeze on them by (1) increasing the quantity to be purchased by 60,000 tons, and (2) inviting producers, from whom processors have to acquire unprocessed fruit to submit offers."

He then stated that requests for renegotiation or cancellation had been received from *10 of the 13 contracting processors.** Smith recommended renegotiation of the existing contracts between CCC and processors covering the first 61,000 tons purchased so that prices to be paid thereunder would permit the packers to pay producers not less than $135 per ton for natural condition raisins. At the trial, Smith, a studious and careful witness, declared that he had prepared this report after full consideration of the facts then before him, that he felt his recommendations were the best solution at the time, and that at the date of trial he had not changed his conclusions that the contracts between CCC and the processors should have been renegotiated at a higher price (R. 567-570).

Smith's recommendations were rejected at a meeting of the

*West Coast, one of the 13 contracting processors, had been granted a contract for only 70 tons; and Lion, another, had received a contract for only 100 tons (Pl. Ex. 54). Sun Maid, a cooperative, was not in a short position because of tonnage held by its grower-members. In other words, there were ten packers with a substantial stake and there were ten protests.

Board of Directors of CCC held on October 27, 1947, at which Secretary Anderson occupied the chair (Pl. Ex. 49; R. 405). This decision of the Board is in marked contrast to the attitude of the Board members expressed to Senator Downey when he met with them on October 9. At that time several of those present indicated knowledge of the packers' position as well as of the inequity of increasing CCC's purchases (R. 115-119). The record discloses no reasons why the Board rejected Smith's proposals but is replete with references to reasons why the Secretary of Agriculture opposed them.

The Secretary's reasons for holding the packers to their contracts are indicative of the nature of the whole transaction. This was a business deal, pure and simple, and was so treated by the Department and by CCC. Appellant cannot now hide behind the cloak of sovereignty. The Secretary indicated that packer bids in response to Announcements No. 1 and No. 2 were lower than he had expected. He had looked for bids in the neighborhood of $175 per ton, reflecting a return to growers of approximately $135 per ton (R. 448). Instead, bids came in at a level of approximately $150 reflecting a return of $110 to growers. If the Department's purpose was price support, as counsel for Appellant now so staunchly maintains, release of packers from their CCC contracts, as requested by Rosenberg in its telegrams of October 14 and 15, would have effectuated that purpose. But Secretary Anderson had indicated that he wanted CCC to purchase raisins at a price at which they could be resold in foreign countries with unfavorable exchange rates and to the Armed Services ("a tough trader"), and he was satisfied with the bids made. He testified that he regarded the deal as an "ordinary business proposition" (R. 402), that "as a business proposition, a free bid had been made" and the bidder must abide by it (R. 404). Rosenberg's bid was the lowest bid, and while he could have rejected a bid near the upper limit, he was reluctant to cancel a low bid for which other bids could not

be substituted (R. 404).* The Secretary believed he was bound to account to the General Accounting Office for all CCC transactions, and that all such transactions would be carefully scrutinized by the Controller General, and he wanted to be very sure his actions would not subject *him* to criticism (R. 403). Moreover, he had been advised by the Solicitor of the Department of Agriculture that he could not cancel the packer contracts and substitute higher bids because it would be to the financial disadvantage of CCC (R. 403-404).

Accordingly, on November 6, 1947, Secretary Anderson, ignoring Smith's recommendations, refused Rosenberg's request for cancellation, and informed Rosenberg that he would await return of offers under the Department's changed program before determining whether further modifications would be made (Pl. Ex. 23).

Rosenberg had been unable to acquire sufficient natural condition raisins to cover its CCC commitments prior to the changes announced on October 14, 1947. Thereafter growers turned strong holders, partly because of the urgings of grower groups, and partly in expectation of direct sales to CCC at high prices. Grower bid forms became available on November 5, and the large tonnage offered to CCC by growers was removed from the possibility of packer purchase (Pl. Ex. 44). On November 26, 1947, CCC itself rejected *all* grower offerings because they had been made at "prices in excess of $135" per ton (Pl. Ex. 24). Certainly, packers could not have been expected to cover their CCC commitments at prices so ridiculously high that even CCC rejected them.

On November 26, 1947, the Department announced that in the future CCC would require all processors selling raisins to CCC to certify that they had paid not less than $135 per ton for natural

*Even if the Secretary's reasoning is valid, the facts do not bear him out. While Rosenberg was low bidder under Announcement No. 1, it was the high bidder under Announcement No. 2 (Pl. Ex. 54). Packers near the upper limits on the first call also requested cancellation, but Secretary Anderson rejected *all* such requests.

condition raisins used in processing packed processed offerings to CCC (Pl. Ex. 24). The announcement of the $135 certification requirement, coupled with CCC's rejection of all grower bids because they exceeded $135 per ton, indicated for the first time what price level CCC considered fair, and the field market accordingly stabilized at approximately $135 per ton (which reflected a price of $175 per ton for processed raisins) (Pl. Ex. 44). The certification requirement, in effect, placed a support price of $135 per ton on natural condition raisins, and violated the terms of the September 5 announcement that prices would *not* be supported at any given level (Finding 34). Rosenberg bought heavily while the market remained at this level.

Meanwhile, in November, Dwight Grady made a trip to Washington seeking either renegotiation of price or cancellation of Rosenberg's CCC contracts (R. 239 et seq.). His trip proved unsuccessful, and on December 2, 1947, Dave Davidson, Administrator of CCC, in a telegram, refused the relief sought and informed Grady that CCC considered the Rosenberg contracts in full force and effect and expected delivery thereunder (Pl. Ex. 26).

Grady was dismayed by this response and called Secretary Anderson by telephone on December 4, 1947. Anderson indicated that renegotiation of price was possible, and told Grady to work out his claim with Dave Davidson (Pl. Ex. 27). In accordance with the Secretary's suggestion, Grady again telegraphed Davidson asking for a price adjustment (Pl. Ex. 28). Davidson's reply, dated January 21, 1948 (Pl. Ex. 29), took the position that Rosenberg was under obligation to deliver pursuant to its CCC contracts. Until this time Rosenberg had consistently refused to honor CCC's delivery notices (Def. Ex. V, W). Grady had instructed Rosenberg's shipping department not to deliver at the time the first Notice to Deliver was received from CCC (October 16, 1947). In the first instance, Grady had told Laflin, the head of Rosenberg's Shipping Department, to inform CCC that Rosenberg "didn't have the raisins" (R. 296; Pl. Ex. 20). After that, it became a

routine matter until new instructions were issued (R. 300-302). Laflin filled out and forwarded the mimeographed forms prepared in advance by the Shipping and Storage Branch of PMA for all packers (Def. Ex. W; R. 634). In using mimeographed letters in lieu of shipping notices, PMA obviously anticipated a refusal to deliver. Grady testified that Rosenberg progressively acquired raisins, and that he did *not* continue to tell Laflin at the time each delivery was refused, that Rosenberg did not have the raisins, but merely told him not to ship while he was attempting to have the CCC contracts cancelled (R. 318). Rosenberg's refusal to deliver during this period was based on its desire to protect its contractual position, as well as to leave open the possibility of renegotiation or settlement of its CCC contracts (Finding 38).

On January 22, 1948, Laflin, pursuant to Grady's instructions, informed CCC that Rosenberg was now in a position to make deliveries against its CCC Contract 1647* and requested reinstatement of its tonnage (Pl. Ex. 30). On January 23, Grady wrote Senator Downey asking for his help, and mentioning Rosenberg's loss of $315,000 on its CCC sales (Pl. Ex. 31).

Several days later, Werner Allmendinger, a contracting officer for CCC, sent a telegram dated January 26, 1948, to Rosenberg (Pl. Ex. 32) citing Rosenberg's failure to honor CCC's prior delivery notices under Contract 1647 and referring to the mimeographed letters filled in by Laflin (Def. Ex. W). He then inquired whether Rosenberg would deliver if it received other notices to deliver provided that no damages for nondelivery would be sought by Commodity Credit Corporation other than waiver of carrying charges on all raisins covered by Contract 1647; asked Rosenberg's advice as to its intention to deliver under Contracts 1647 and 1893†; and stated that CCC was willing to take delivery under

*Contract 1647 covered the raisins included in Rosenberg's first offering to CCC.

†Contract 1893 covered the raisins included in Rosenberg's second offering to CCC.

both contracts at the contract price, and that the only price increase would be $0.0005 per pound for raisins packed in export containers. He advised Rosenberg that CCC would not pay carrying charges on raisins covered by Contract 1647 and asked that Rosenberg indicate its agreement to the arrangements set forth or otherwise indicate its intention as to performance. After a number of telephone conversations (R. 269 et seq.; 603 et seq.), Rosenberg by a series of telegrams agreed to *ship* under both its CCC contracts (Pl. Ex. 32-36).* Grady unequivocally testified that he told Allmendinger that he was unwilling to prejudice his company's claim against CCC, and further stated that he did not intend to waive Rosenberg's claim by sending the telegrams or by agreeing to ship (R. 276-277). The court found that Rosenberg neither expressly nor impliedly waived its rights to claim damages against CCC by its agreement to ship (Finding 39). The specific nature of the telegrams sent and Grady's conduct immediately before and after the exchange of telegrams are completely inconsistent with waiver.

On January 30, 1948, the day after Grady sent the last telegram to Allmendinger, he received a telegram from Senator Downey (Pl. Ex. 37) stating that Downey was looking into Rosenberg's claim and would report developments. Grady did not tell him to terminate his efforts or indicate the possibility that Rosenberg had waived any of its rights. On the contrary, he immediately telephoned Downey and at Downey's suggestion again made a trip to Washington to press Rosenberg's claim (R. 278-279). He conferred with Department of Agriculture officials and was advised that Rosenberg should file a formal claim. Grady spent the next several days with his counsel preparing the claim, but submitted it first to Senator Downey because of his reluctance to file such a document which reflected on the reputations of persons in high

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*These telephone conversations and telegrams will be discussed in greater detail in connection with Appellant's waiver defense, *infra*.

places (R. 279-282). After consultation, it was decided that the only course was to file the claim, and it was filed with S. R. Smith on February 26, 1948 (Pl. Ex. 38). Additional information was furnished in support of the claim at a later date (R. 284). Grady pressed the claim whenever he was in Washington, and in September, 1948, visited Clinton Anderson, then a Senator, in New Mexico, and subsequently corresponded with Anderson about their December, 1947, telephone conversation in which Anderson had discussed renegotiation of price (R. 284-292). On February 8, 1949, Senator Anderson wrote the Office of the Solicitor of the Department of Agriculture about Rosenberg's claim (Def. Ex. H) stating that his correspondence with Grady was not as full as it might be because he felt Grady was getting ready to sue the Department of Agriculture, and he would prefer to give his material from the witness stand. Senator Anderson further stated that he would like to see justice and equity done to Rosenberg and felt its claim should be negotiated. Anderson did not mention waiver, and Rosenberg's preparations to sue were, of course, inconsistent with waiver.

On October 13, 1949, Smith denied Rosenberg's February 26, 1948, claim (Def. Ex. I). The denial did not mention waiver and in fact referred to supplemental letters indicating active support of the claim. After Smith's denial, Grady saw the new Secretary of Agriculture, and at his suggestion voluntarily submitted Rosenberg's claim to the Contract Disputes Board of CCC (R. 293).* For the first time, at the hearing before that Board on April 26, 1950, government counsel charged that Rosenberg had waived its rights. After denial of Rosenberg's claim by the Contract Disputes

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*The Contract Disputes Board was composed of the officials of the same Department which had already turned down Rosenberg's claim, and its legal advisor was the Solicitor of Agriculture who had advised the Secretary to reject the claim. The hearing was a closed one, and Rosenberg had no opportunity to cross-examine witnesses. Nevertheless, Rosenberg appeared and presented its case because it had every wish to cooperate with Department officials before seeking legal redress.

Board, the present action was filed. Rosenberg's unbroken course of conduct is completely inconsistent with any waiver of its rights, and amply supports the finding of the trial court that there was no waiver (Findings 39, 41).

SPECIFICATION OF ERROR ON CROSS-APPEAL

(1) The District Court erred in holding that Rosenberg covered its CCC commitments after December 12, 1947.

(2) The District Court erred in not including raisins costed before December 12, 1947, in calculation of Appellee's damage.

(3) The District Court erred in not costing the raisins delivered to CCC by Rosenberg either on a first-in first-out basis, or on an average cost basis.

SUMMARY OF ARGUMENT

Proprietary Nature of CCC's Conduct

Rosenberg's contracts with CCC were commercial purchases of raisins by a governmental agency for certain limited puposes. The actions of CCC which hindered performance by Rosenberg and increased the cost of raisins acquired to fulfill its contract commitments to CCC were likewise commercial rather than sovereign in nature. Purchase of raisins and the imposition of a condition on delivery (certification that $135 per ton has been paid to growers) are not "public and general" acts. Private contractors as well as government agencies could do the very same things. The court will not be misled by labels such as "price support," but will determine the nature of CCC's 1947 raisin purchase program from an examination of the testimony about its origin and operation. The record shows that low prices were obtained by competitive bidding. The Department of Agriculture regarded the low packer bids which CCC accepted as a closed business deal, and

refused to release Rosenberg from its contracts even though the result of such a release would have been higher prices to growers. The nature of CCC's conduct is a question of fact, and the District Court has already decided on substantial evidence that it was not sovereign (Finding 42). But even conceding the sovereign nature of CCC's conduct, CCC is nevertheless liable to Appellee under the facts of this case.

Breach of Implied Contract Not to Hinder or Render Performance More Expensive.

CCC's conduct subsequent to the execution of Rosenberg's contracts to deliver raisins to it undoubtedly made it more difficult and expensive for Rosenberg to cover its contract commitments. The tremendous increase in CCC's purchase program over the originally stated minimum of 61,000 tons, purchases by CCC from growers in direct competition with Rosenberg, and the requirement of the $135 certification, which in effect supported field raisin prices at a level of $135 per ton, all contraverted the terms of the Secretary's September 5 announcement and contributed to Rosenberg's plight. In view of the unequivocal words of the September 5 announcement, and subsequent insistence by Department officials that there would be no change in the 1947 raisin purchase program as announced, Rosenberg when it entered into the contracts in suit, certainly did not "assume the risk" that the program would be altered in direct violation of the terms of that announcement. Appellee's argument on this point does *not* require a finding that the September 5 announcement constituted an enforceable *promise.* Nor does the decision of the District Court depend on any such premise. The court's finding that Rosenberg did not "assume the risk" of change (Finding 44) is equally supportable if the September 5 announcement be regarded as a *representation,* or only as an announcement of the "rules of the game." After such a representation, or under such rules, one contracting party does *not* assume

the risk that the other will do exactly what he states he will not do. Even if the other's statement is not itself regarded as an enforceable promise, it does define the limits of the other's implied promise not to hinder or obstruct performance.

Absence of Waiver.

Rosenberg did not waive CCC's breach of contract. Waiver is an affirmative defense to be established by defendant, and Defendant here has failed to sustain its burden. Moreover, waiver is a question of fact, and the findings of the District Court (Findings 39, 41) are supported by substantial evidence. There is no evidence of an express waiver by Rosenberg. There is affirmative evidence that Rosenberg preserved its rights and consistently pressed for relief. After CCC's breach, Rosenberg had an election either to perform and claim damages or to rescind. Rosenberg elected to perform and is entitled to recover its damages. Its right to make that election does not depend on whether its contract was profitable or not. This is not a case in which one party *repudiates* an *executory* contract, thus barring performance by the other. CCC did not repudiate, but insisted on performance by Rosenberg.

CCC expressly waived Rosenberg's failure to ship in accordance with the original shipping schedule in the exchange of telegrams between Grady and Allmendinger. In consideration for CCC's change of position, Rosenberg waived any claim for carrying charges. The specific nature of the expressed waivers negatives a general waiver of Rosenberg's claim for damages for breach of contract. CCC's reluctance to admit liability beyond the contract price is a far cry from Rosenberg's acceptance of CCC's position. CCC was unwilling to recognize Rosenberg's claim for damages, and Rosenberg was unwilling to abandon it. Under these circumstances, the parties agreed only to shipment, to a specific and minor alteration in price for export packaging, and to a waiver of carrying charges. Each retained whatever legal rights it otherwise had.

Rosenberg's Damages.

The court found, and there was substantial evidence in the record, that but for CCC's conduct in violation of its implied contract the price of natural condition raisins would have stabilized at $110 per ton or less, and Rosenberg could have covered its CCC commitment at that level (Findings 24, 35). These are facts and if, as we contend, they are supported by substantial evidence, the Appellate Court will not substitute its judgment for that of the trial court. The trial court also found that the direct and proximate result of CCC's conduct in violation of its implied contract was to increase the field price of Thompson seedless raisins and render Rosenberg's performance more expensive (Findings 34, 36, 43). This is a finding of fact which should not be disturbed on appeal since there is substantial evidence supporting it.

The District Court erred, however, in looking only to raisins which Rosenberg costed after December 12, 1947, as a measure of its damage. There is uncontradicted evidence in the record that Rosenberg was acquiring raisins for its CCC contracts throughout the 1947 season as quickly as it could after its CCC contracts were made, and that it had costed all of the raisins necessary to cover its CCC commitments *before the end of January, 1948*. Such acquisition was in conformity with its normal business practice of acquiring and costing raisins to cover its sales commitments in the order in which they were made. Under the circumstances, Rosenberg's damages should have been measured by costing its raisin acquisitions on a first-in first-out basis, or in the alternative on an average cost basis. This is not a proper case for application of the "minimum cost" principle advanced by Appellant.

ARGUMENT

I. CCC Cannot Escape Liability for Its Action by a Claim that Its Conduct Was Sovereign Action.

A. THE EVIDENCE SHOWS THAT CCC'S CONDUCT WAS NOT SOVEREIGN ACTION.

Appellant attempts to hide behind the cloak of sovereignty by discussing the *general* nature of Commodity Credit Corporation and pointing out how CCC carries out its price support functions.* But the case before this court is not a "general" one. It arose on a specific set of facts. Appellant admits (1) that raisins are a non-basic commodity for which price support is not mandatory (App. Op. Br. p. 14) and (2) that in addition to its price support functions, CCC also carried on a supply program† and a commodity export program (App. Op. Br. p. 12). Admittedly, Congress has declared a policy that CCC, in carrying on its purchasing and lending operations in connection with nonbasic commodities, such as raisins, should conduct those functions so as to promote parity with other commodities to the extent funds are available (15 U.S.C. 713a-8(b); App. Op. Br. p. 14-15). But this does not make such purchasing and lending operations *per se* sovereign acts. The declared purpose is *supplemental* and *incidental* to a non-sovereign proprietary function of CCC. Procurement of supplies by contract is non-sovereign in character even where the supplies procured will be devoted to sovereign purposes, e.g., use of the Armed Services in national defense. Liability has been imposed on the United States, itself, in connection with such activity. See *Amoskeag Mfg. Co. v. U. S.* (1873), 84 U.S. (17 Wall.) 592, 21 L.Ed. 715, where the United States was held liable on a contract to purchase carbines for the Army in spite of the fact that a change in design (in the interest of national defense) ordered by the United States prevented the manufacturer from delivering within the six-month

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*In so doing, Appellant even resorts to a budget estimate which is not in evidence (App. Op. Br., p. 12).

†Procurement for government agencies, Armed Forces, etc.

period specified in the contract; *U. S. v. Peck* (1880), 102 U.S. 64, 26 L.Ed. 46, where the Court held that the purchase of hay by the United States for an Army fort from the only available local source interfered with performance by a contractor who had agreed to deliver hay to the fort, and violated the implied contract of the United States not to hinder his performance, thus releasing the contractor from liability for failure to deliver; *U. S. v. Smith* (1876), 94 U.S. (4 Otto) 214, 24 L.Ed. 115, where the United States was held liable like a private contractor for damages occasioned by a suspend order under a contract for construction of buildings at an Army fort; and *Reiss & Weinsier v. U. S.* (Ct. Cl. 1953), 116 Fed. Supp. 562, where the United States was held liable for suspension and cancellation of a contract for construction of public housing.

The liability of CCC for its actions in this case is further illustrated by *Beuttas v. U. S.* (Ct. Cl. 1944), 60 Fed. Supp. 771 (cited in App. Op. Br. p. 29). The court there held that the action of the United States in advertising for laborers to work on the superstructure of a building for higher wages than the plaintiff contractor was paying for laborers working on a contract with the United States to complete the substructure imposed liability on the United States to compensate the contractor for increased wage expense occasioned by the government's action. The basis of the decision was the government's violation of its implied contract not to make the plaintiff's performance more difficult or expensive. In reversing the Court of Claims, the United States Supreme Court, *U. S. v. Beuttas* (1945), 324 U.S. 768, 89 L.Ed. 1354, did not question the existence of the implied contract or the non-sovereign nature of the government's action, but based its decision solely on the ground that payment of higher wages on the superstructure *was not the proximate cause* of the contractor's increased cost.

In none of the cited cases was the United States allowed to avoid the consequences of its *contractual* actions (changing contract

specifications, purchase of hay, interference with performance by suspension, hiring labor at higher wages) on the ground that its acts were sovereign. These cases control in the present action.

The court will not be misled by the "price support" label on Docket OC-95a. In the first place, the Docket was a secret document, the distribution of which was confined to Department of Agriculture officials (R. 163-164). The public announcement of the raisin purchase program (Pl. Ex. 4) stated that prices would *not* be maintained at any given level, but that the program would enable the *industry itself* to complete plans for readjustment on a self-help basis. In the second place, the Docket placed a maximum limit of 133,000 tons on dried fruit purchases, and the announcement of its general terms (Pl. Ex. 4) stated that 61,000 tons was the portion of this maximum allocable to raisins. Why was this maximum adopted? Secretary Anderson and the Docket itself answer this question. Only a limited quantity of raisins was to be purchased for certain enumerated outlets. CCC was not to purchase an unlimited quantity to support prices. There was to be no stockpiling of surplus raisins. Secretary Anderson was not going to repeat the mistakes of the potato program (R. 354-356). All raisins acquired were to be received by or for the account of CCC and *disposed of by sale,* in the following channels:

(a) Sales to Section 32 and to United States Government agencies other than for export.

(b) Sales for export, to foreign governments and their purchasing agents, to United States Government agencies for foreign relief feeding, to public international organizations like the United Nations, to private domestic exporters, and to foreign importers.

(c) Sales in domestic commercial channels for human consumption, where possible without depressing the domestic market.

(d) Sales in domestic commercial channels for disposal other than as human food, if not fit for human consumption.

Whether or not purchase for these purposes was designed to produce profit or income for the United States is immaterial in passing on the nature of the purchases. The fact is inescapable that CCC in purchasing raisins for these designated purposes was exercising a *procurement function.* Removal of part of the surplus was an *incidental* effect, and does not change the essential nature of the operation; nor does the "hope" of the Department of Agriculture (Pl. Ex. 4) that CCC purchases would enable the dried fruit industry to complete its readjustment on a self-help basis.

If the primary purpose of CCC was to support prices, it could have made unlimited purchases at a fixed price. But this was not CCC's purpose in acquiring raisins in 1947. To use Secretary Anderson's own words, CCC would take raisins only at prices at which they could be moved to foreign countries with an exchange problem or could be sold to the Army which was "somewhat of a tough trader" (R. 360). To accomplish its purpose of procuring raisins at the *lowest* prices at which it could obtain them, CCC called for *competitive bidding* and accepted the *low* bids. When bids under Announcement No. 1 came in at lower levels than Secretary Anderson expected, CCC, as it had a right to do, could have rejected all bids. It was importuned to do so by the unsuccessful bidders, but instead asked the *low* bidders for an extension of time and accepted their bids (Pl. Ex. 11, 12, 54; R. 367). When it was apparent that bids under Announcement No. 2 would be even lower because of the competition of the unsuccessful bidders under the first call, CCC nevertheless again asked for bids, and when the bids did come in at a lower level, accepted them (Pl. Ex. 54). Senator Downey testified that he was told that Secretary Anderson was happy over the low bids the packers had made and "didn't want to let the packers out of their contracts" (R. 118); and that CCC was trying to save money and had obtained "valuable" and "economical" contracts on the basis of its representation that it would buy only 60,000 tons (R.

143). When Rosenberg offered to cancel all its grower contracts at prices under $140 per ton if CCC would release Rosenberg from its CCC commitments (Pl. Ex. 17, 18), CCC and Anderson refused cancellation in spite of the fact that cancellation would have allowed growers to get a better return, i.e., would have supported prices. Anderson gave as some of the reasons for his refusal that "This was an ordinary business transaction" (R. 402); that "as a business proposition" he would not cancel the Rosenberg contracts because a free bid had been made and those people must abide by it (R. 404); furthermore that cancellation would not be to the "financial advantage" of CCC (R. 450-453). When CCC altered its program and grower bids came in at relatively *high* levels, CCC did reject *all* bids because prices exceeded $135 per ton (Pl. Ex. 19). CCC as a *business* matter was unwilling to pay such prices for raisins. Throughout the operation of the 1947 raisin program CCC's conduct was that of a businessman anxious to obtain raisins at a good price for disposition in accordance with a preconceived plan in certain designated channels. This is not "sovereign action."

B. CCC'S ACTIONS IN BREACH OF ITS IMPLIED CONTRACT WERE NOT "PUBLIC AND GENERAL" ACTS.

What is the action of CCC which plaintiff claims was an actionable breach of contract?

> (1) On October 14, 1947, CCC announced that it would increase its raisin purchase program to 121,000 tons—60,000 tons more than the maximum announced on September 5, 1947—a figure large enough to remove the *entire* surplus from the market and in sharp contrast to its original plan of purchasing only *part* of the surplus.
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> (2) CCC also announced that it would purchase raisins directly from *growers* in competition with Rosenberg and other packers, a violation of its September 5 representation that it would purchase *only* from packers.

(3) On November 26, 1947, CCC announced that processors and packers would be required to certify they had paid no less than $135 per ton to growers on all future offerings to CCC, a violation of its September 5 representation that it would not maintain prices at any given level.

All of these announced changes were subsequently executed by CCC. *Every one of these actions could have been taken by a private contractor.* They are obviously not "sovereign" in their nature.

The accepted test of the liability of a governmental body, voiced in *Horowitz v. U. S.* (1925), 267 U. S. 458, 69 L.Ed. 736, is that *in the absence of an express agreement or representation, the United States is not liable for its "public and general" acts as a sovereign.* The "public and general" act before the court in that case was an embargo on the shipment of silk. The embargo applied to *all* shippers and was of a mandatory and legislative character. The government had made no representation or announcement that it would not embargo silk. The purchase of raisins and the imposition of contract conditions is activity of a completely different nature. Sovereign act might be a defense (in the absence of any agreement or representation) if Rosenberg's performance had been hindered by such "public and general" acts as an embargo on the shipment of raisins, a general increase in the ceiling price of natural condition raisins, a priority system for packaging materials, or seizure for violation of the Food and Drug Act. None of these acts could have been performed by a private person; they were inherently governmental in nature. But any private contractor with enough capital could have increased its raisin purchases by 60,000 tons, and any private contractor could have altered its purchasing methods and dealt directly with growers, or imposed as a condition to purchase a certification that raisins had been acquired from growers for at least $135 per ton.

This is conduct "ordinarily engaged in by private individuals." (This test is proposed in Appellant's Opening Brief at pp. 22-23.) There is no doubt that a private contractor would be liable for such conduct. It does not become sovereign merely because CCC was an agency of the United States. In performing these acts, CCC was merely exercising its charter powers as a Delaware corporation: "to purchase, or otherwise to acquire, to hold or otherwise deal in, to sell or otherwise dispose of any and all agricultural and/or other commodities * * *" (Def. Ex. AJ, Article Third (b)).

The spurious nature of Appellant's argument that the test of sovereign action is whether the activity is carried on for profit (App. Op. Br. pp. 22-23) is apparent from the various examples of so-called "governmental action" which it lists—the operation of schools, art galleries, swimming pools, slum clearance, and the lighting of streets. It is common knowledge that a municipality or other governmental body is bound by its *contract* for construction of a school or swimming pool, or the cleaning of an art gallery, or the erection of street lights. Sweeping statements are of no help. The court must examine the nature of the very transaction before it. *U. S. v. Turlock Dehydrating & Packing Co.* (D.C. Cal.), 116 Fed. Supp. 822, cited on page 29 of Appellant's Opening Brief for the proposition that a price support program is of a sovereign nature, is easily distinguishable because of the nature of the transaction before that Court. It merely held that *subsidy payments* by CCC to packers to enable them to sell processed raisins at OPA ceiling prices, when the cost of raisins in the field would not otherwise allow sale at such a level, was sovereign action. Consequently, a state statute of limitations did not bar a suit by the United States to recover subsidy payments made on poor quality raisins. The payment of subsidies to all who qualify is inherently a governmental function, and would not be undertaken by a private person. The *Turlock* case is not concerned

with the type of CCC activity of which Rosenberg complains, nor does it even consider the liability of a government agency to a private litigant for breach of its implied contract not to hinder or render more expensive the other contracting parties performance.

C. CCC IS LIABLE, LIKE ANY OTHER PRIVATE CONTRACTOR, IN ITS COMMERCIAL TRANSACTIONS.

A government agency is subject to the same rules of law as any other private corporation when it acts in the commercial sphere and does not exercise sovereign powers of government.

> *U. S. v. Skinner and Eddy Corp.* (W.D. Wash. 1928) 28 F.2d 373, 385, *mod. on other grounds* (C.C.A. 9, 1929) 35 F.2d 889;
>
> *R. F. C. v. J. G. Menihan Corp.* (1941) 312 U.S. 81, 85 L.Ed. 595.

Even the United States Government itself is liable for its actions as a contractor, performed in its proprietary, as distinguished from its sovereign capacity.

> *Horowitz v. U. S.* (1925) 267 U.S. 458, 461, 69 L.Ed. 736, 737;
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> *Maxwell v. U. S.* (C.C.A. 4, 1925) 3 F.2d 906, 911, *aff'd* (1926) 271 U.S. 647, 70 L.Ed. 1130.

D. ACTIONS BY THE SAME FEDERAL AGENCY WITH WHICH A CONTRACTOR HAS MADE HIS AGREEMENT ARE VIEWED IN A DIFFERENT LIGHT FROM ACTIONS OF A SEPARATE AND INDEPENDENT GOVERNMENT AGENCY.

The actions which the District Court found were in breach of CCC's contract are actions of the very same agency with which Rosenberg made its contract. The September 5 announcement was made by the Secretary of Agriculture who was also Chairman of the Board of CCC, on behalf of CCC; the contracts in suit were made by the Fruit and Vegetable Branch of PMA, on behalf of

CCC; the acts which the court found breached CCC's implied contract were additional purchases of raisins by CCC, purchases by CCC directly from growers, and the requirement by CCC of a certification on all sales to CCC that growers had been paid $135 per ton.

Beuttas v. U. S. (Ct. Cl. 1948), 77 Fed. Supp. 933, 936 (not to be confused with the *Beuttas* case discussed *supra* p. 28), in holding the United States liable, distinguished the *Horowitz* case and other sovereign act cases on the ground that:

> "* * * in all of those cases the contracting officer had nothing whatsoever to do with the acts complained of, while in the present case it was the very department of Government that entered into the contracts with plaintiffs that directed the plaintiffs to work forty-eight hours per week rather than forty hours."

E. CCC'S EXPRESS REPRESENTATIONS RENDER IT LIABLE TO PLAINTIFF EVEN IF ITS ACTIONS WERE SOVEREIGN IN NATURE.

Even if it be conceded for purposes of argument that CCC's conduct was sovereign in nature, it does not necessarily follow that *under the facts of this case,* CCC can escape liability to plaintiff. Sovereign action by a governmental agency *under contract* differs markedly from sovereign action where there is no contract.

The express representations contained in the September 5 announcement make this case very similar to *Gerhardt F. Meyne Co. v. U. S.* (Ct. Cl. 1948), 76 Fed Supp. 811. The plaintiff in that case was a contractor who had agreed to perform certain construction on a military reservation. The contract specifications contained the following clause:

> "S.C. 13. Entrance for trucks shall be at South Gate of reservation, over Walker Avenue, Highwood, Illinois, via Patten Road to site. * * *"

When military authorities closed the south entrance of Patten Road, it became necessary for plaintiff to construct and pave addi-

tional roads for access to the building site. The court regarded the quoted language as a representation (on which plaintiff's bid was based) that the listed roads were available and gave plaintiff judgment for its extra expenses in road construction and paving. It assumed that the action of the military authorities in closing the south entrance of Patten Road was sovereign, and stated:

> "* * * Defendant *represented* these roads would be available from which it is to be *implied* that if they would not, the Defendant would stand the increased cost.
>
> "Defendant cannot enter into a binding agreement that it will not exercise a sovereign power but it can say, if it does, it will pay you the amount by which your costs are increased thereby". (*Id.* at 815; Emphasis added.)

See also

Sunswick Corp. v. U. S. (Ct. Cl. 1948), 75 Fed. Supp. 221, 228, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755;
Stafford v. U. S. (Ct. Cl. 1947), 74 Fed. Supp. 155;
York Engineering & Construction Co. v. U. S. (Ct. Cl. 1945), 62 Fed. Supp. 546, *cert. den.* (1946) 327 U.S. 784, 90 L.Ed. 1011;
Bostwick v. U. S. (1876), 94 U.S. 53, 24 L.Ed. 65.

All of these cited cases held the United States liable for sovereign action on the basis of its contractual representations, stating that liability rested on the *contract* rather than upon the act of the government in its sovereign capacity.

The court should follow the doctrine of these cases in deciding this appeal, since Rosenberg, in the instant case, made its CCC contracts in reliance on CCC's representations that it would purchase no more than 61,000 tons of raisins in the 1947 crop season, that its purchases would be made from packers but not from growers, and that it would not support prices at any given level. CCC's contemporary references to the September 5 announcement

(*infra* p. 58) show that CCC itself regarded the announcement as an integral part of its raisin purchases, and intended that packers rely on it in making their bids.

F. APPELLANT'S AUTHORITIES DO NOT CONTROL IN THIS CASE.

Appellant cites *Cherry Cotton Mills v. United States,* 327 U.S. 536 (App. Op. Br. p. 23) for the proposition that *all* acts of the federal government are governmental in nature even though performed by federal agencies and instrumentalities. It follows that with a statement that the government is not liable for damages resulting from performance of its sovereign functions (App. Op. Br. p. 25). The third line of this preposterous syllogism is not supplied. If these statements were true, the United States would *never* be liable for *any* of its acts!!!

But the *Cherry Cotton Mills* case does not stand for the proposition for which it is cited. It merely involves the right of the United States to offset a processing tax refund against a loan due it from a processor. The court confines its opinion to the counterclaim situation and at 327 U.S. 540 specifically states:

> "The Government here sought neither immunity nor priority. Its right to counterclaim rests on different principles * * *."

An intergovernmental tax immunity case such as *Fed. Land Bank v. Bismarck Lumber Co.* (1941), 314 U.S. 95 (App. Op. Br. p. 23), which involves the immunity of a Federal Land Bank from a state sales tax is completely irrelevant in a case such as the instant one involving *contract* liability of an independent corporate instrumentality of the United States. Moreover, in the *Bismarck Lumber Co.* case, a Congressional statute required the immunity from state taxation. Here, by statute, CCC may sue and be sued on its contractual commitments.

The general language which Appellant quotes from *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (App. Op. Br. p.

24) is equally inapplicable to the facts before this court. The holding of the court in the *Merrill* case was merely that a farmer could not rely on the erroneous representation of an official of the Federal Crop Insurance Corporation as to the coverage of an insurance policy, where Wheat Crop Insurance Regulations (published in the Federal Register*) made a crop uninsurable. The quoted language refers to that situation—the liability of a principal for representations of its agent where the representations conflict with published limitations on the agent's authority, and the publication gives legal notice of the contents of the regulations.

Demings Case, 1 Ct. Cl. 190, and *Jones and Brown's Case,* 1 Ct. Cl. 383, cited on page 25 of Appellant's Opening Brief, concededly involved the performance of sovereign functions: the imposition of additional duties, the passage of the Legal Tender Act and the withdrawal of federal troops from Indian territory. How different these public and general acts are from the contractual acts of CCC in this case!

Grant v. T.V.A., 49 Fed. Supp. 564 (App. Op. Br. p. 26) bears out this distinction. The court in that case held that T.V.A. was not liable for crop damage resulting from its activities in control of flood waters and in promotion of navigation, activities entirely dissociated with any business in competition with private enterprise. These are functions which *only* government could perform. But when Appellant cited this case, it failed to mention the remainder of the court's opinion in which it stated that T.V.A. is liable for all wrongs pertaining to the generation, use, and sale of the electric energy created by its dams since

> "the functions of the defendant in the commercial field are entirely different. Upon principle and authority it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens." (49 Fed. Supp. at 566)

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*Title 44 *U.S.C.* § 307 provides that appearance of regulations in the Federal Register gives legal notice of their contents.

In citing *Commonwealth Finance Corp. v. Landis* (D.C. Pa.), 261 Fed. 440 (App. Op. Br. p. 26), Appellant also ignores the court's language (261 Fed. at 443) that insofar as the Emergency Fleet Corporation is acting as a private corporation, and insofar as its assets are used as private property, it is *not* immune from the liabilities of a private litigant.

In *Standard Accident Ins. Co. v. U. S.* (Ct. Cl.) 59 Fed. Supp. 407 (App. Op. Br. p. 28) a lump sum contractor with the United States was denied recovery against the United States for higher labor costs incurred when it became necessary for him to pay overtime to meet the competition of government cost plus contractors in the vicinity for labor. The decision was based on *"assumption of risk"* by the contractor (59 Fed. Supp. at 409). The "8 hour day" clause had been deleted from the plaintiffs' contract on account of the war emergency, thus expressly recognizing the effect of the National Defense and Appropriation Acts under which the cost plus work was being performed. The plaintiff voluntarily signed his contract with knowledge of the deletion. The terms of the contract in question in the *Standard Accident* case are markedly different from those of the Rosenberg contracts, particularly when the representations of the Secretary of Agriculture are considered. The doctrine of assumption of risk has no application here.

The *Froemming* case (Ct. Cl.) 70 Fed. Supp. 126 (App. Op. Br. p. 28) involved more than diversion of war materials to a higher priority destination to further the nation's war program. The court in that case also held the United States was liable to reimburse the contractor for the cost of unnecessary transportation of machinery to the Canal Zone on government order, and for delays occasioned by a government order prohibiting the transportation of gasoline through the work area. The court's ruling that the United States was not liable for delays occasioned by diversion of equipment to higher priority uses for prosecution of

the war (a sovereign function) has no application to the *contractual* procurement activities of CCC in the instant case. Furthermore, the government had made no representation in the *Froemming* case which remotely resembled the Secretary's September 5 announcement.

II. CCC Breached Its Implied Contract Not To Obstruct Rosenberg's Performance or Render It More Expensive.

A. A CONTRACT NOT TO PREVENT OR HINDER PERFORMANCE BY THE OTHER PARTY TO AN EXECUTORY CONTRACT WILL ALMOST ALWAYS BE IMPLIED.

Generally, and in most situations, a contract not to hinder performance or render performance by the other party to a contract more expensive will be implied from the mere fact that a contract calling for performance by the other party has been executed. The absence of such an implied contract depends upon *exceptional* circumstances. Thus, Corbin in his treatise on Contracts states:

> "In any kind of contract, if the right of one party to compensation is conditioned upon the rendition of some service or other performance by him or on his behalf, it is *nearly always* a breach of contract for the other party to act so as to prevent or hinder and delay or to make more expensive the performance of the condition. It is a breach of duty only because the court finds a promise by implication not to prevent or hinder." 3 Corbin on *Contracts* (1951 Ed.) § 571. (Emphasis added) See also 4 *Ibid* § 947.

The authorities which Appellant cites (App. Op. Br. p. 33 *et seq.*) do not alter the fact that such a promise will *generally* be implied. They relate only to the scope of that promise. Appellant's argument that the implied promise is not broken by a contractor's purchases in competition with a supplier under contract to furnish him a product is based on assumption of that risk by the supplier. When the risk is not assumed, there is an actionable breach of the

implied contract. Thus, *Restatement of Contracts,* § 315, recognizes that such conduct may constitute a breach if "not within the risk assumed." Williston, *Contracts* (Rev. Ed.), § 1293A (App. Op. Br. p. 33), like Corbin, regards non-liability as an *"exception"* to the general principle, and states that the exception must be made "where the hindrance is due to some action of the promisor which *under the terms of the contract* or customs of the business he was *permitted* to take." Where the risk is "not naturally and properly to be anticipated," hindrance is a breach of the implied contract.

This statement of the law is supported by the cases. *Patterson v. Meyerhofer* (1912), 97 N.E. 472, 204 N.Y. 96 gave one contracting party affirmative relief against the other party to an executory contract for the purchase of four houses. In that case defendant purchaser knew that the plaintiff did not own the houses which plaintiff was contracting to sell, but intended to purchase them at a foreclosure sale. Defendant repudiated his contract and outbid plaintiff at the foreclosure sale, securing the houses for less than the contract price.* The court allowed plaintiff his loss of profit on the theory that defendant had breached his implied covenant not to prevent plaintiff's performance, stating:

> "In the case of *every* contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other from carrying out the agreement on his part."

See also

Orton v. Embassy Realty Associates (1949), 91 C.A. 2d 434, 438; 205 P.2d 427;

Tanner v. Title Insurance & Trust Co. (1942), 20 C.2d 814, 825; 129 P.2d 383.

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*Note the striking similarity to CCC's conduct in competing with Rosenberg by soliciting and accepting bids from growers after the changes in its program were announced in October, 1947.

The cases which Appellant cites at the top of page 39 of its Opening Brief are not in point since none of them involve an implied contract not to hinder or prevent performance. Each of these cases deals with a radically different type of implied promise, not present in "almost every" contract, which a court must imply from particular facts. In *Cherrywood Apartments v. U. S.* (Ct. Cl.), 98 Fed. Supp. 577, plaintiff was unable to show any contract whatsoever with the United States. *Columbia Railway & Power Co. v. City of Columbus* (1918), 249 U.S. 399, *Lloyd v. Murphy,* (Cal.) 153 Pac. 47, and other cases cited by Appellant on pages 39-41 of its Opening Brief are cases between private litigants to which the United States is not even a party. The interference with performance in each case is not interference by the other contracting party, but the effect of sovereign action by the United States *which was not a party to the agreement in suit.* Such cases have no application here.

Appellant attempts to distinguish *U.S. v. Peck* (1880), 102 U.S. 65 (App. Op. Br. p. 41), one of the leading cases establishing the existence of an implied promise not to hinder or prevent performance or to render performance more difficult or expensive, on three grounds: (1) presence of an express agreement, (2) total prevention and (3) the fact that no affirmative relief was sought. These distinctions are not valid and do not avoid the controlling logic of this case.

The facts of the *Peck* case stated by Appellant, and as they appear in the reports, disclose no "express agreement" that Peck was to cut hay for the Tongue River garrison at Big Meadows. The procurement contract contained no reference to the source from which the hay was to be furnished. The court, however, allowed parol evidence of the circumstances surrounding the transaction. There was, at most, a "mutual understanding" between the Chief Quartermaster and the contractor that the hay was to be cut in Big Meadows. Secretary Anderson's September 5 announce-

ment and repeated insistence by CCC officials that the program "as announced" would not be changed make the instant case even a stronger one for implication of a contract not to render performance more difficult or expensive than the *Peck* case.

Total prevention was not the ground on which the court in the *Peck* case based its decision. It is difficult to believe that no hay at all was obtainable. It could have been hauled from a distance at greater expense. But, even assuming that total prevention was shown in the *Peck* case, the implied contract cannot be so narrowly construed. Cases finding breach of the implied contract do not distinguish between total prevention and conduct rendering performance more difficult or expensive. Thus, in *George A. Fuller Co. v. U.S.* (Ct. Cl. 1947), 69 Fed. Supp. 409, a contractor was allowed to recover damages from the United States on account of delay occasioned when the government failed to furnish models for the contractor to follow. The contract contained no express provisions allowing damages for such a delay but the court allowed recovery on the ground that:

> "It is, however, an implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party *or that will hinder or delay him in its performance.*" (*Id.* at 411. Emphasis added.)

In *Sunswick Corp. v. U.S.* (Ct. Cl. 1948) 75 Fed. Supp. 221, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755, a lump sum contractor with the United States was allowed to recover extra labor costs. The contract specifications prepared by the United States fixed a wage rate for carpenters of $1.25 per hour. The Federal Wage Readjustment Board reclassified the contractor's carpenters into a higher paid category. The court allowed the contractor to recover the wage difference from the United States. The contract

contained a clause allowing price adjustments for higher wages, but the court stated that even in the absence of such a provision

> "* * * the Government could not in its capacity as a contracting party, compel the contractor to pay wages in excess of the specified minimum rate without subjecting itself to liability for breach of the implied condition that *neither party would increase the other party's cost of performance.*" (*Id.* at 230. Emphasis added.)

The fact that no affirmative relief was sought in the *Peck* case* does not limit to that situation the applicability of the principle on which the decision is based. The implied contract not to hinder or prevent performance is available both as a defense and as a ground for *attack* in contract actions.

> 4 Corbin on *Contracts* (1951 Ed.) 814;
> *Patterson v. Meyerhofer* (1912) 97 N.E. 472, 204 N.Y. 96;
> *Sunswick Corp. v. U.S.* (Ct. Cl. 1948) 75 Fed. Supp. 221, *cert. den.* (1948) 334 U.S. 827, 92 L.Ed. 1755;
> *George A. Fuller Co. v. U.S.* (Ct. Cl. 1947) 69 Fed. Supp. 409.

B. THE REPRESENTATIONS MADE IN THE SEPTEMBER 5 ANNOUNCEMENT AND SUBSEQUENT CONDUCT OF CCC OFFICIALS PRECLUDE THE CHARGE THAT ROSENBERG "ASSUMED THE RISK" OF A CHANGE IN CCC'S 1947 RAISIN PURCHASE PROGRAM.

Whether or not Rosenberg "assumed the risk" of the changes in CCC's 1947 raisin purchase program is a question of fact. The District Court found that Rosenberg did not assume that risk (R. 58; Finding 44). There is ample evidence in the record to support

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*Plaintiff was suing to recover payment on a contract to supply wood, which had been performed; the United States attempted to offset its damages for plaintiff's failure to deliver hay against the price due for wood, and the court held that the action of the United States which interfered with plaintiff's performance of its contract to deliver hay excused performance under that contract.

that finding and it should not be disturbed by an appellate court.

The September 5 announcement itself removed all possibility that Rosenberg should assume the risk of change in the program. Its words were definite and unequivocal. The announcement stated that CCC "will" purchase up to 133,000 tons of dried fruit; that the "*maximum limit* * * * is" divided into certain enumerated amounts of each type of dried fruit (61,000 tons of which are raisins); that purchases under the program "will" be made from processors and packers; that an announcement "will" be issued soon inviting packers to make offers on a portion of the quantity "to be purchased"; that raisin purchases "will" be confined to the Thompson seedless variety; that the program "does not provide price support at any given level". The Department could have used words of equivocation such as "may" or "might" but it did not. That it realized the difference is apparent from its use of the word "expect" in the announcement when referring to probable results.* Secretary Anderson even expressly invited the dried fruit industry "to complete its plans for readjustment" on the basis of the program announced.

CCC's raisin purchase program was based on approximately the same surplus estimate as the industry had prepared (Pl. Ex. 3).† Whether or not this figure was accurate, it was the best obtainable, it was prepared by qualified persons, and it was the basis on which the CCC raisin purchase program was planned. The program was to take only 61,000 tons, leaving a *known* surplus of

*Appellant states (Op. Br. p. 47) that the "announced *objective* of the program was to achieve prices which would be fair both to producers and consumers." The language of the announcement does *not* state the *objective* of the program, but rather refers to its probable *results*. CCC's "plan" to establish a price of $125—$135 per ton (App. Op. Br. p. 48) was a secret plan uncommunicated to anyone outside the Department. The September 5 announcement does not indicate such a plan. It outlined a supply program and stated that prices would not be maintained "at any given level."

†In fact, CCC's estimate in the economic data supporting Docket OC-95a was slightly in excess of the industry estimate (Pl. Ex. 5).

40,000 tons overhanging the market. It provided for purchases from *packers* and not from *growers.* It was *not* to support prices at any given level. These terms were released to the press and circulated by mail to Rosenberg. Two announcements calling for bids on a portion of the quantity covered by the September 5 announcement followed. The two calls for raisins totalled 61,000 tons, exactly the amount specified in the September 5 announcement as the maximum purchase. The CCC Board even told Senator Downey that low bids had been obtained from packers on the basis of these "representations" as to CCC's maximum purchases (R. 143).

If flexibility was so essential, CCC could easily have used "words of hope and expectation," and could have indicated the tentative nature of its program. It did not. Instead, it summarily rejected all requests for change. When Rosenberg suggested another procedure which Grady felt would provide "prices satisfactory to producers and the Department" (Pl. Ex. 6), Smith replied (Pl. Ex. 8) that the suggested changes were "contrary to the Secretary's statement" and that the "program as announced" was a "substantial contribution towards stabilized conditions within the Dried Fruit Industry." His concluding words added a ring of finality to his other statements: "We solicit and expect receive cooperation Rosenberg and other packers in making it a success." Grady's conversations with other Department and CCC officials were of similar general purport (R. 173-177).

Appellant argues that the doctrine of "assumption of risk" precludes the implication of a contract not to hinder Rosenberg's performance "unless we find some representation by CCC that there would be no change of program" (App. Op. Br. p. 49). In the light of the facts, this "argument" becomes a *concession* that the implied contract does exist in this case.*

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*Indeed at one point in the trial, counsel for CCC, in answer to questions from the court, expressly conceded:

(1) That it was *not* "within the contemplation of the parties" that

C. THE SEPTEMBER 5 ANNOUNCEMENT WAS RELIED UPON BY ROSENBERG, AND CCC INTENDED IT TO BE RELIED UPON.

Whether the September 5 announcement was issued with contractual intent is immaterial for the purposes of this case. As has already been pointed out, CCC is liable on its implied promise not to hinder Rosenberg's performance whether or not the September 5 announcement was an enforceable promise of CCC. The mere existence of the announcement and its communication to Rosenberg suffice to support the holding of the trial court that Rosenberg did not "assume the risk" of change in the program.

Nevertheless, some of Appellant's comments about the September 5 announcement cannot pass unchallenged (See App. Op. Br. p. 50). Counsel loosely declare that the press release was not intended by Appellant as a contractual commitment, citing pp. 458-459 and 471 of the Record. Counsel might have more accurately stated that it was *Secretary Anderson's uncommunicated intention* that the September 5 release was not contractual. Secretary Anderson even attempted to explain the 61,000 ton maximum limitation on raisin purchases as a "control on the officials of Commodity Credit Corporation" (R. 365). Announcement to the press and circulation to the dried fruit industry is indeed a novel manner of imposing a contractual limitation on administrative officials of CCC! The true purpose of the September 5 announcement appears in the Docket and in the next to last sentence of the announcement itself ("to enable the dried fruit industry to complete its plans for readjustment on a self-help basis"). It was obviously intended that Rosenberg and other packers should rely on this announcement of the whole program in making their bids in response to it and to

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CCC would enter into purchase contracts with growers (R. 394), and

(2) That the $135 certification requirement was *not* "within the contemplation of the parties" at the time Rosenberg and CCC entered into the contracts in question (R. 392).

S. R. Smith also testified that the 1947 raisin purchase program "as announced" on September 5, 1947, did not provide for support of raisin prices "at any fixed level" (R. 481).

the calls for "portions of the quantity to be purchased," contemplated by it, i.e., Announcements No. 1 and No. 2 (Pl. Ex. 9, 14). The court so found (Findings 13, 18, 19; Testimony: R. 167-169, 170-171, 178-195, 217, 370, 375-376, 383-384, 508-510).

Rosenberg's view of the September 5 announcement is also misrepresented in Appellant's Brief. Appellant makes a great "ado" about Dwight Grady's testimony that the September 5 release was not a basis on which the *vendor* (Rosenberg) makes any commitment (App. Op. Br. p. 50). Grady testified only that the release "itself" was not a basis on which a vendor made its commitment. But in this case the September 5 press release was followed by the mailing to members of the industry, including Rosenberg, of a copy of the text of the release, and of invitations to bid on portions of the quantity covered; and Rosenberg and other packers then made offers to sell raisins to CCC. In making its bids, Rosenberg did rely on the September 5 announcement as the basis for determining whether or not to sell (R. 315-316, 383-384; Findings 13, 18, 19). Grady also testified that while Rosenberg did not rely upon a newspaper story of the contents of the Secretary's September 5 announcement in making its bids, it did rely upon the copy of the announcement which it received in the mail and upon statements of government officials that Rosenberg was expected to cooperate in *the* program thus announced (R. 369-379, 383-384).*

The attempts of Grady and other interested parties to secure a change in the program after the September 5 announcement do not mean that they believed the announcement was only a tentative plan. As Grady declared, Rosenberg did not regard the release *itself* as a binding contract. It became *binding* when followed by

*Smith's rejection of Grady's Webb-Pomerene proposal (Pl. Ex. 8) refers to the Secretary's September 5 statement as a standard, and then "solicits and expects" the cooperation of Rosenberg and other packers in "*the* program as *announced*." The last phrase can refer only to the Secretary's announcement of the program on September 5.

a formal offer and acceptance based upon its terms. At the time Grady and others sought modification of the program, neither of Rosenberg's bids had been accepted by CCC. There was *no* contractual commitment at all until Rosenberg's first bid was accepted. *After acceptance,* CCC could not without liability hinder Rosenberg's performance of its executory contract. But even after a contract is made, there is nothing to prevent a party from asking for modification. The point here is that CCC flatly refused to make any changes.

Kluge's conversations with Smith (App. Op. Br. p. 50) have no relevance to Rosenberg's reliance on the September 5 announcement of the raisin program. Kluge discussed the *prune* program with Smith (Pl. Ex. 6). He was in the prune business and not in the raisin business (R. 646). Counsel's statement that Kluge "presumably" relayed Smith's alleged words (that Smith was in no position to tell him whether CCC would buy more than the maximum quantities stated in the September 5th release) to Grady is completely unsupported by the record (R. 498-499). Grady flatly denied that Kluge had told him any such thing (R. 646). At the trial, when counsel attempted to raise the same inference on the basis of Grady's reference, in his September 9 telegram to Smith (Pl. Ex. 6), to a discussion with Kluge of his conversation with Smith, the court commented that counsel's implication was "pure inference and speculation" (R. 499).

Counsel continues to "speculate" on even flimsier grounds (App. Op. Br. p. 52) that Grady did not rely on the September 5 announcement after receivinig Smith's telegram (Pl. Ex. 8). Grady's "recognition of the hazard of selling short" is a far cry from assuming the hazard that CCC would change its raisin purchase program. There are indeed *market* hazards in a short sale. The hazards which Rosenberg "assumed" in taking a short position when it bid on the CCC contracts were these usual hazards of supply and demand and no others. The "assumption of risk

doctrine" has never been applied to the risk that one contracting party will act contrary to its expressed representations on which the other party bases its offer.

Counsel misquotes Grady as stating, "If the growers were successful in securing a change we might be required to pay $150 a ton for raisins". Grady's words were "if the growers *had been* successful * * *" (R. 205). He was not talking as of 1947, but in retrospect at the date of the trial, immediately after stating Rosenberg's expectation in 1947 that "Setrakian could not change the laws of supply and demand" and that Rosenberg was convinced the program would *not* be changed (R. 204-205).

Grady's memorandum re Corbaley's statements (Def. Ex. B) relates to the *price level* at which CCC would purchase under the program as announced. The loose phrase "what Washington may do is always a gamble" is meaningless unless read in context. Moreover, Grady passes on Corbaley's opinion "for what it is worth." The language which Appellant emphasizes in Grady's letter to Cooper (Def. Ex. AH) is also rather meaningless general language. This evidence, typical of that on which Appellant relies, clearly illustrates the weakness of its position, as indeed does its reference to exhibits which are not in evidence.*

Appellant's counsel continuously make charges that Rosenberg bid "below the market" and "took a gamble" when it bid on the CCC calls for raisins. Neither of these statements is true. In the early part of the season when CCC called for bids, there was little trading except for early delivery at premium prices, and there was no established market. What better evidence of *market level* could there be than the Sun Maid bid on 20,000 tons, only slightly higher than Rosenberg's bid under Announcement No. 1 and

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*In the footnote on page 52 of Appellant's Opening Brief reference is made to the contents of Defendant's Ex. P and Q as if they were in evidence. Lest the court be misled, these exhibits *were not admitted*. Even if they were in evidence, the newspaper stories were reports of *rumors* of *unsuccessful* efforts to effect a change, and came *after* Rosenberg's first bid was accepted and *after* its second bid was submitted to CCC.

slightly lower than Rosenberg's bid under Announcement No. 2? Rosenberg did not bid in response to CCC's calls in order to "take a gamble" or to "make a killing" or in the hope of a "great profit." Such charges are ridiculous. Grady testified that it was very unusual for Rosenberg to go short to the extent that it did in bidding on CCC's 1947 raisin program; that Rosenberg had never engaged in wide speculation of the sort required by the CCC bids; that at the time bids were called for by CCC, no supply market had been established, raisins were not yet in existence or ready for delivery; that growers normally will not sell before they know what their raisin crops are, even ignoring other conditions which contributed to their reluctance to sell in 1947; and that the short position which was forced upon Rosenberg was one of its objections to the program (R. 384-385). Grady also stated that as a large factor in the industry, it was necessary for Rosenberg to participate in the CCC program if the surplus situation was to be alleviated; that Rosenberg officials felt that the Department was relying on them to participate, and that it was important to commercial handlers to see the surplus removed so that there would be price stability for the balance of the crop. Rosenberg's cooperation was "solicited and expected" by the Department (Pl. Ex. 8). Rosenberg decided to bid after it had given up hope that the program would be changed (R. 199). With the realization that even Setrakian (head of the grower organization) could not change the laws of supply and demand, with knowledge of the 100,000 ton surplus, and in the belief that the CCC program would not be changed, Rosenberg decided it would be able to cover its bids to CCC without suffering a loss (R. 204-205). In making its bid, Rosenberg calculated what its competitors would bid and made its own bid at a price which it felt had a chance of getting the business (R. 199). In the opinion of Grady and his associates, Rosenberg surely would have been able to cover its CCC bids at $110 per ton or less under the program as announced (R. 217-218).

Appellant's speculation over what Rosenberg "might" have done instead of bidding as it did (App. Op. Br. p. 55) is completely unrealistic. If Rosenberg and other packers had refused to bid, the whole 1947 purchase program would have failed. A similar result would have followed if Rosenberg and other packers had bid only on raisins which they had obtained from growers at a fixed price. If Rosenberg had based its bid on the price growers were asking, other packers would have had the business, or if all packers had based their bids on the price growers were asking, it is probable that CCC would have rejected all bids.* Rosenberg's decision was made on the basis of the facts known at the time its bids were made. These included the September 5 announcement. CCC is liable for damage to Rosenberg caused by its action inconsistent with that announcement.

Counsel for Appellant also suggests a pragmatic test for determining the existence of an implied contract on the part of CCC, and declares that it is "inconceivable" that CCC would knowingly have agreed to compensate the packers for any loss resulting from a change in its program (App. Op. Br. p. 54). If such a possibility is so "inconceivable," why did S. R. Smith, head of the branch of PMA in charge of the raisin purchase program, recommend renegotiation of packer contracts (Pl. Ex. 50)?

D. THE LEGAL AUTHORITIES CITED BY APPELLANT DO NOT RELIEVE IT OF LIABILITY FOR THE CHANGES IN ITS PROGRAM.

Harlingen Canning Co. v. CCC, 93 Fed. Supp. 45, *aff'd* 193 F.2d 176 (App. Op. Br. p. 50), has no bearing on the nature of the September 5 announcement because it did not involve a *change* of program. It was concerned with the validity of an interpretation by CCC of a subsidy regulation. The only news release involved expressly precluded subsidies on products exempt

*CCC did reject all grower offerings on November 26, 1947 (Pl. Ex. No. 24).

from price control, and thus was *consistent* with CCC's denial of a subsidy on the ground that there had been no sale eligible for subsidy until after price control had lapsed. The plaintiff in the case failed to adduce proof which would bring it within a contractual exception to the regulation.

In the *Shedd-Bartush Foods* case (D. Ill. 1955), 135 Fed. Supp. 78 (App. Op. Br. p. 55) the rise in the price of tallow which the plaintiff had contracted to sell to CCC did not result from any action of CCC, but rather from the end of price control, an event which both parties had anticipated. The court had before it a letter from plaintiff written to CCC complaining of losses under another contract because of purchases during a decontrol period. The letter was written at the time the contract in question was made and evidenced the plaintiff's knowledge and assumption of the risk of decontrol. In the present case the action which caused Rosenberg's loss was that of CCC itself; and CCC had in the September 5 announcement expressly represented that it would not take the action complained of.*

Both *Cherrywood Apts. Inc. v. U.S.* (Ct. Cl. 1951), 98 Fed. Supp. 577 and *R.F.C. v. MacArthur Mining Co.* (C.A. 8, 1950) 184 F.2d 913, *cert. den.* 340 U.S. 943, *rehg. den.* 341 U.S. 917 (App. Op. Br. pp. 56-57) are distinguishable because in neither of those cases did the plaintiff have a *contract* with the United States. In the *Cherrywood* case, a builder attempted to create a contract out of his reliance on a declaration of legislative policy expeditiously to remove public housing which competed with private housing which the builder had constructed in reliance on the declaration of policy. In the *MacArthur Mining* case the

*It is interesting that the court in the *Shedd-Bartush* case assumed without passing on the issue that a *CCC announcement* of contemplated purchases of oleomargerine, including a statement that CCC would arrange a source of coconut oil at ceiling prices if the successful bidder could not secure coconut oil through usual channels, was a part of the purchase contract.

plaintiff attempted to "manufacture" a contract out of its continued operation in reliance on a Presidential letter to a United States Senator declaring a "national policy" that prices paid in the raw metals and minerals program would assure a fair rate of return. Plaintiff had no formal contract with a federal agency. The court, in the language quoted on page 58 of Appellant's Brief, recognized this defect when it stated that a government policy "does not give rise to a contract *in and of itself*" (emphasis added). Moreover, in the *MacArthur* case, the plaintiff alleged that the Presidential letter had the "force and effect of law," and presented its case on the basis that it resembled a *statute* (which of course, can be amended in the absence of contractual rights). An additional distinction is the fact that plaintiff's operations had commenced *prior* to the date of the letter so that plaintiff could not claim action in reliance.

The exclusive franchise cases which Appellant cites (App. Op. Br. pp. 58-60) are merely examples of a special doctrine that the agreement of a governmental body not to grant a similar franchise to "other persons" does not give rise to any implication that the governmental body, itself, will not compete with the exclusive franchiseholder. The doctrine goes no further. Its limitations are exemplified by *The Binghamton Bridge* (1865), 70 U.S. (3 Wall.) 51, 18 L.Ed. 137 where the court held that a state legislative act authorizing contruction of a bridge and making it unlawful to erect another bridge within two miles precluded the *legislature* from authorizing another person to construct such a competing bridge after the original bridge had been constructed in reliance on the statute.

Appellant's statement of *U.S. v. Binghamton Construction Co.*, 347 U.S. 171 (App. Op. Br. p. 60) is misleading. The basis of the decision in that case was not the non-contractual nature of the wage schedule prepared by the government. The court assumed it was contractual in nature but found it was a *minimum* wage

schedule, and that the contractor, by the very terms of the contract, might be required to pay *more.* In the case before this court, CCC announced a *maximum* purchase.

E. WHILE DETERMINATION OF THE CONTRACTUAL NATURE OF THE SEPTEMBER 5 ANNOUNCEMENT IS NOT ESSENTIAL TO THE DECISION OF THE DISTRICT COURT, IT ACTUALLY WAS A CONTRACTUAL COMMITMENT BINDING UPON CCC.

The decision of the District Court did not turn upon the contractual nature of the September 5 announcement. It was based on CCC's implied contract not to hinder or render Rosenberg's performance more expensive, so that the September 5 announcement was pertinent only insofar as it related to the risks assumed by Rosenberg. A close examination of the record does, however, demonstrate that the September 5 announcement was an integral part of Rosenberg's raisin contracts with CCC.

1. Documents Which Alone Do Not Give Rise to Contract Rights May, Nevertheless, Become Part of a Contract When Followed by a Formal Offer and Acceptance Which Does Create a Contractual Relationship.

The contracts here in question are not single documents contained within the four corners of one sheet of paper. Contract 1647 consisted of:

(1) The September 5 announcement (Pl. Ex. 4).

(2) Announcement No. 1 (Pl. Ex. 9) calling for bids on 30,000 tons of the 61,000 tons covered by the September 5 announcement.

(3) Completed mimeographed bid form filed by Rosenberg with CCC (Pl. Ex. 10).

(4) PMA 100—a printed sheet of standard contract conditions (Pl. Ex. 10).

(5) CCC's telegraphic acceptance of Rosenberg's bid conditioned upon an extension (Pl. Ex. 11).

(6) Rosenberg's consent to the extension (Pl. Ex. 12).

Contract 1893 consisted of:

(1) The September 5 announcement.

(2) Announcement No. 2 (Pl. Ex. 14) calling for bids on the balance of the 61,000 tons covered by the September 5 announcement.

(3) Completed mimeographed bid form filed by Rosenberg with CCC (Pl. Ex. 15).

(4) PMA 100.

(5) CCC's telegraphic acceptance of part of Rosenberg's bid (Pl. Ex. 16).

When there has been a final and formal assent of the parties to a "piecemeal contract" such as this, the terms of the contract may be found in earlier documents, letters, etc., even though not restated in the final acceptance.

> *1 Corbin on Contracts* (1950 Ed.) §§ 22, 31;
>
> *Ottney v. Finnie* (1935) 5 C.A. 2d 356, 42 P.2d 714 (printed prospectus of golf club regarded as part of contract);
>
> *Mayers v. Loews, Inc.,* (1950) 35 C.2d 822, 221 P.2d 26 (letter and employer bulletin regarded as part of collective bargaining agreement).

2. The Several Steps in the Origination and Consummation of a Transaction Must Be Considered as a Whole and Read Together to Determine the Intention of the Parties and the Terms of Their Agreement. It Is Not Necessary That They Refer to Each Other.

The mimeographed bid forms (Pl. Ex. 10, 15) which Appellant chooses to call "the contracts" (App. Op. Br. p. 46) certainly did not contain the entire contract of the parties, but were merely the formal *offer* by Rosenberg which culminated the series of communications making up "the contract" when *accepted* by CCC. All of the instruments passing between the parties must be examined to find the terms of the agreement.

> "It is well-settled law that several writings executed between the same parties substantially at the same time and relating to the same subject matter may be read together as forming parts of one transaction, nor is it necessary that the instruments should in terms refer to each other if in point of fact they are parts of a single transaction." *Bailey v. Railroad Co.* (1872) 84 U.S. (17 Wall.) 96, 108, 121 L.Ed. 611, 613.

See also:

Doherty Research Co. v. Vickers Petroleum Co. (C.C.A. 10, 1936) 80 F.2d 809, *cert. den.* (1936) 299 U.S. 545, 81 L.Ed. 401;

Layne-Bowler Chicago Co. v. Glenwood (C.C.A. 8, 1929) 34 F.2d 889;

Williston, *Contracts* (1937 Ed.) § 628;

12 *Am. Jur.,* Contracts § 246;

17 *C.J.S.* 714.

The absence of any reference to the September 5 announcement in the mimeographed bid forms (Pl. Ex. 10, 15) filed by Rosenberg with CCC is without significance. These forms were prepared by CCC and merely filled in by Rosenberg. There was no space on the form in which Rosenberg could state on what it relied in making its bid. Moreover, the September 5 announcement was made on behalf of CCC, and it would be novel indeed to require Rosenberg to reiterate the undertakings of the *other* party to its contract.

3. Contemporary Statements by Officials of the Department of Agriculture Also Demonstrate That the September 5 Announcement Was a Part of the Whole Contract.

A copy of the September 5 announcement was sent by mail to Rosenberg. The September 5 announcement was carefully edited before its release. It was the *only* announcement of the general plan of the *whole* raisin purchase program. It was the "immediate"

announcement of the program contemplated by the Docket. Announcements No. 1 and No. 2 were only *parts* of the program. The Docket was formally amended (Pl. Ex. 5; Def. Ex. M) to provide for raisin purchases in excess of 61,000 tons although the 61,000 ton figure appeared no place in the Docket itself, and *only* appeared in the September 5 announcement. S. R. Smith described the September 5 release as the announcement of "the general plan" of the "dried fruit purchase program * * * the terms and conditions of which were *more* specifically announced in Announcements No. 1 and No. 2" (Def. Ex. I), and then testified that he stood responsible for the language and had the assistance of the Solicitor's office in preparing the letter in which it was contained (R. 508-509). Announcements No. 1 and No. 2 were undoubtedly the calls for bids on a "portion of the quantity to be purchased" referred to in the September 5 announcement (Pl. Ex. 4). The sum of the tonnage called for by both announcements was exactly the 61,000 tons specified in the September 5 announcement. After bids were accepted, the Department of Agriculture recognized the character of the September 5 announcement by stating that purchases had been made "under the program announced by the Department September 5, 1947" (Pl. Ex. 13), and by summarizing the total purchases of dried fruit "since offers to purchase were originally announced by the Department on September 5" (Pl. Ex. 19).

III. Rosenberg Did Not Waive Its Rights to Recover Damages from Appellant.

Appellant makes two points with respect to waiver:

(1) Rosenberg's performance after knowledge of CCC's breach amounted to waiver of its claim for loss suffered in the course of such performance.

(2) Rosenberg's invitation to an amendment and performance of the amended contract, with knowledge that CCC understood the contract to be fully binding, waived the breach.

Neither point is well taken. The first is based on an erroneous statement of the law, as well as upon an unsupported view of the facts, and the second proceeds on an unwarranted factual assumption.

A. ROSENBERG DID NOT WAIVE ITS RIGHT TO CLAIM DAMAGE BY PERFORMANCE AFTER KNOWLEDGE OF CCC'S BREACH.

1. The Facts Are Misrepresented by Appellant.

Although Rosenberg's conduct *prior* to October 14, 1947, has no material bearing on waiver by performance, Appellee, nevertheless, believes it should correct certain comments with respect to such conduct contained in Appellant's Brief (App. Op. Br. p. 62). Appellee challenges statements that Rosenberg bought raisins only for its commercial customers prior to mid-December, 1947. This is one of the bases of the cross-appeal in this case and will be more fully discussed in the section on damages, *infra*. Suffice it to say, at this point, that Rosenberg, both before and after October 14, bought all the raisins it could buy and closed purchase contracts at the best price level it could in order to fulfill its CCC contracts, and that by the end of January, 1948, it had the raisins "for" its CCC commitment. That Rosenberg regarded the CCC contracts as firm "sales" at or about the time they were made is evidenced by the two sales tags covering its CCC contracts (Def. Ex. C), and, even more forcefully, by Rosenberg's acquisition of raisins in quantities far exceeding its commercial sales as fast as it could acquire them after the CCC contracts were made.

2. The Law Is Misstated by Appellant.

Appellant contends that by acquisition of raisins to cover its CCC commitments and performance after CCC's breach Rosenberg waived its right to damages. As has already been indicated, Rosenberg acquired at least some raisins for the CCC contracts *before* the breaches occurred. But even assuming for purposes of argument that all acquisitions followed the breaches of contract, Rosenberg's performance did not waive its rights.

The controlling legal principle is stated in *Bu-Vi-Bar Petroleum Corp. v. Krow* (C.C.A. 10, 1930), 40 F.2d 488, 490, a suit to recover damages for breach of contract to drill an oil and gas well. The court found that the plaintiff had made its election to treat the contract as broken, but in discussing plaintiff's rights observed:

> "When defendant repudiated the contract, plaintff had an election of remedies as follows: (a) to rescind the contract and recover the value of any performance rendered. (b) To treat the repudiation as an immediate breach and sue at once for any damages which plaintiff has sustained. (c) To treat the contract as binding and wait until the time for its performance and thereafter bring an action on the contract for its breach".

The same legal principle has been voiced in 2 *Fed. Law of Contracts* § 429 where the statement appears:

> "Where there is a breach of contract by one party thereof, the party not in default may stop and refuse any further performance, and claim full damages for the breach. He is not required to do so, but may continue to perform insofar as he is permitted and then claim damages for the breach."

See also:

5 *Corbin on Contracts* (1951 Ed.) § 1105 p. 469;

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952 (recognizing right of one party "to continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained" after a *partial* breach of contract by the other party).

CCC's breach of contract gave Rosenberg an election to rescind or perform and claim the damages resulting from the breach. Until January, 1948, Rosenberg sought renegotiation of price or cancellation. Meanwhile it was acquiring raisins. When its efforts for administrative adjustment failed, it decided to deliver and claim its damages. It had every legal right to do this.

Although Appellant denies this right, none of the cases which it cites are in point. This is a breach of contract case. It is not a fraud case, and it is not a case of repudiation by CCC. CCC in fact continuously insisted on Rosenberg's performance. Under these circumstances Rosenberg was not bound to avoid losses by rescission. It retained its right to elect to perform.

The *Bu-Vi-Bar* case, *supra,* 40 F.2d at 492 contains language which illustrates the difference between the instant case and repudiation cases:

> "The situation of the injured party, where there has been a breach which does not indicate an intention to repudiate the remainder of the contract, and the situation of the injured party where there has been a total renunciation of the contract, differs in important particulars. In the former case, the injured party has a genuine election either of continuing performance or ceasing to perform * * * Any act, indicating an intent to continue, will operate as a conclusive election * * * On the other hand, where the contract is wholly renounced, there can be no real election between continuation and cessation of performance * * *, because, after notice of renunciation, the other party cannot go on and complete an executory contract and sue for any increased damages resulting from his continuing to perform".

See also

Williston, *Contracts* (Rev. Ed.) § 1298.

The legal authorities cited by Appellant (App. Op. Br. p. 63) are all clearly distinguishable. Thus, neither *Monad Engineering Co. v. U.S.,* 53 Ct. Cl. 179 nor *Bd. of Trustees v. O. D. Wilson Co.* (D.C.A.) 133 F.2d 399, involves breach of contract. The former concerned a contractor who performed without protest after discovering a *changed soil condition,* and the latter, a contractor who performed after discovering *his own mistake* in bidding. In *Dubois Construction Co. v. U.S.* (Ct. Cl.) 98 F.S. 590, the court found that the plaintiff had *not* relied upon a representation (made *after*

his bid was submitted) as to the starting date of a job; moreover, his performance *without protest* after defendant's delay in the issuance of a proceed notice was a waiver of the delay; and there was *no breach of contract,* in any event, because the contract language was consistent with the defendant's delay. Both *B. & O. Railway v. Jolly Bros. & Co.* (Ohio) 72 N.E. 888 and *Simon v. Goodyear Metallic Rubber Shoe Co.* (C.A. 6) 105 Fed. 573 dealt with waiver of damages for *fraud* rather than breach of contract. In addition, the contract in the *Jolly Bros.* case precluded parol modification, so that an oral promise to pay additional compensation was unenforceable. In *H. E. Crook Co. v. U.S.* 59 Ct. Cl. 593, the waiver consisted of performance *without claim or protest* after delay caused by the other party.

B. ROSENBERG DID NOT WAIVE ITS RIGHT TO CLAIM DAMAGES BY INVITING AN AMENDMENT AND AGREEING TO PERFORM AT THE CONTRACT PRICE.

1. The Facts on Which Appellant's Argument Is Premised Are Not Supported by the Record.

After being informed by CCC that it was under an obligation to deliver (Pl. Ex. 29), Rosenberg, by letter dated January 22, 1948 (Pl. Ex. 30), requested an amendment extending the delivery date and reinstating its tonnage under Contract 1647. On January 26, 1948, CCC sent a telegram (Pl. Ex. 32) which went not only to Rosenberg but to all packers who had CCC raisin contracts. This telegram dealt only with *shipment* and *delivery* of raisins under the CCC contracts and a *waiver of carrying charges.** Only one

*On October 10 and 16, 1947, CCC had issued Notices to Deliver (Def. Ex. V) under Contract 1647. After October 16, CCC used informal letters in lieu of Notices to Deliver (Def. Ex. W). CCC did not issue either letters or Notices to Deliver under Contract 1893 during the original delivery period. No notices were issued under Contract 1893 until shipment was ordered after January 30, 1948 (Def. Ex. X). The Office of the Solicitor was concerned that CCC might be liable for carrying charges under Article 6 of PMA 100 (Pl. Ex. 10) because of its failure to issue Delivery Notices in the original delivery period.

other minor matter was covered—an increase in price for export packaging. There was no reference to Rosenberg's claim for damages for CCC's breach of contract.

Upon receipt of the telegram on January 27, 1948, Grady telephoned to Allmendinger (CCC's Contracting Officer), suggested that a simpler procedure would be to extend the contracts, and advised Allmendinger of Rosenberg's pending claim against CCC and that he did not wish to prejudice that claim. Grady testified that Allmendinger replied that the claim did not concern him and he was only interested in whether Rosenberg would *ship* (R. 270). Allmendinger could not remember his response (R. 607), but on cross-examination admitted that as a Contracting Officer of CCC he had no authority to settle Rosenberg's claim (R. 617-618). Grady then sent a telegram confirming an agreement to extend the period for shipment, and requested shipping instructions (Pl. Ex. 33). Upon receipt of this telegram, Allmendinger called Grady and told him he did not construe his first wire as an agreement that Rosenberg would *ship*. Grady made notes of a supplemental telegram suggested by Allmendinger on his copy of the first one sent by him (R. 270-273; Pl. Ex. 34), and Grady then sent the suggested telegram (Pl. Ex. 35) accepting the price increase for export containers and stating Rosenberg's intention to deliver under *Contract 1893*. Allmendinger was still not satisfied and called Grady again informing him that it was possible to construe his first wires as not agreeing completely to *ship* and *waive carrying charges on Contract 1647* if delivery notices were issued (R. 613). In a third telegram (Pl. Ex. 36), Grady expressly agreed to *ship* and *waive carrying charges under Contract 1647*. Allmendinger also testified to a telephone conversation with Grady on January 27 or 28, 1948, in which he informed Grady that CCC would issue shipping instructions if he accepted the proposal in Allmendinger's January 26, 1948, telegram; and that CCC would not agree to recognize Rosenberg's claim. He referred

to a memorandum which he testified contained notes of this conversation. On cross-examination, he admitted that the memorandum also reflected his conversations with other packers, and that generally speaking his whole recollection of his conversation with Grady appeared in his notes (R. 619-622). Allmendinger also admitted that the memorandum covered only his own comments and did not reflect Grady's responses (R. 623).

The references in Allmendinger's telegram (Pl. Ex. 32) to *contract price* are equivocal. If CCC intended to extract a waiver of Rosenberg's claim for *damages,* it should have so stated. It did not. Rosenberg's replies to Allmendinger's telegram were strictly limited assents and in no sense related to Rosenberg's *damage* claim. The first reply (Pl. Ex. 33) confirmed Rosenberg's agreement to "*extend period for shipment* as outlined your wire." It contained no reference to price. The second reply (Pl. Ex. 34) dealt only with a small price adjustment for export packing, and stated Rosenberg's intention to "*deliver* raisins" under Contract 1893. The last telegram (Pl. Ex. 36) was merely an agreement to "ship" and "waive carrying charges" under Contract 1647. The very fact that so many specific replies were necessary demonstrates that Rosenberg agreed only to what was stated in its responses and no more. If Rosenberg was not concerned with reserving its rights to claim damages, it could have sent a general acceptance to *all* terms contained in Allmendinger's wire.

Rosenberg did not intend to waive its claim for damages for breach of contract, but, as a matter fact, reserved it, and continued its protests to CCC and the Department of Agriculture. Appellant characterizes Allmendinger's comments when Grady told him of his efforts to get relief for Rosenberg in Washington, as a "rejection" of Grady's proposed reservation of rights. Nothing could be farther from the fact. Allmendinger lacked power either to accept or reject any proposal for compromise of Rosenberg's claim against CCC; he was concerned only with *shipment,* and he told Grady

that in so many words (R. 270, 617-618). Grady specifically told Allmendinger that he did not intend, by agreeing to ship, to waive Rosenberg's claim (R. 276-277).

When asked by the District Court, to point out evidence of Rosenberg's alleged waiver, Counsel for Appellant, indeed, admitted that he was "not able to point to anything in the record in which the Government or Rosenberg made any definite commitment about the breach" (R. 665). Waiver is a matter of fact. It is an affirmative defense to be proved by CCC.

> Rule 8(c), *Fed. Rules of Civ. Proced.;*
> 4 *Cyc. Fed. Proced.* (2d Ed.) § 1322, p. 643.

The District Court found that Appellant did not sustain its burden of proof, and that Rosenberg had not as a matter of fact waived its rights (Findings 39, 41). Its findings should not be disturbed on appeal.

2. Rosenberg Has Not, as a Matter of Law, Waived Its Rights.

There is no evidence in the record of an express waiver by Rosenberg and Appellant does not claim one. To find implied waiver there must be "unequivocal and decisive acts or conduct of the party clearly evincing an intent to waive, or acts or conduct amounting to an estoppel on his part." *Yates v. American Republic Corp.,* (C.C.A. 10, 1947) 163 F.2d 178, 180.

See also:

> *Wilkinson & Co. v. McKinley,* (1948) 84 C.A. 2d 100, 190 P.2d 35.

Not only is the record barren of any unequivocal conduct of Rosenberg amounting to waiver, but it contains substantial evidence of Rosenberg's unceasing efforts to preserve its rights and to secure redress.

Performance after Rosenberg's limited agreement to ship and waive carrying charges did not constitute waiver. It was merely

an election by Rosenberg to perform rather than rescind for CCC's breach.

Bu-Vi-Bar Petroleum Co. v. Krow (C.C.A. 10, 1930) 40 F.2d 488, 490;

Winans v. Sierra Lumber Co. (1884) 66 Cal. 61, 4 Pac. 952;

5 *Corbin on Contracts* (1951 Ed.) § 1105, p. 469.

Rosenberg's completion of the CCC payment vouchers and acceptance of payment thereunder did not waive its right to claim damages for CCC's breach of contract. The United States District Court in *Lundstrom v. United States* (D. Ore. 1941) 53 F. Supp. 709, *aff'd* (C.C.A. 9, 1943) 139 F.2d 792, rejected just such a contention, stating at page 711:

> "Finally, the plaintiffs did make out vouchers with certificates * * * in which the price named * * * was set down as 'correct and just.' A condition of a contract may be waived, a right for damages for breach thereof cannot be. It is not an estoppel against their claiming the amount which may be justly due under the contract. There was no way in which otherwise any payment could be obtained. * * * Everyone knows if one who has money due from the United States does not conform meticulously to the regulations as to vouchers no money will be paid * * * Here a certification that the statement is 'correct and just' should not prevent plaintiffs from receiving payment for the work actually done. The United States did not rely upon such vouchers as indicating that no claim for extras would be made. The money paid was certainly justly owing. The question here is whether the United States does not owe more."

See also:

Blair v. U. S. (C.C.A. 8, 1945), 147 F.2d 840, *mod. in other respects* (C.C.A. 8, 1945) 150 F.2d 676.

None of the cases cited by Appellant on pages 65 and 66 of its Brief are in point here. In none of them was there a breach of contract. They all involve consent to contract terms rather than a waiver of damages for breach of contract by the other contracting party.

CCC's waiver of damages on account of Rosenberg's failure to deliver during the contract period is neither evidence of nor consideration for a waiver by *Rosenberg* of its claim for *damages* for CCC's breach of contract. The exchange of telegrams between Grady and Allmendinger clearly establishes that the *quid pro quo* for CCC's waiver of damages for nondelivery was Rosenberg's agreement to *ship* and its waiver of carrying charges on account of CCC's failure to order out the raisins during the contract delivery period. Rosenberg's claim for damages for breach of contract by CCC was in no way involved in the transaction.

IV. Rosenberg Is Entitled to Damages in a Greater Sum Than Allowed by the Trial Court.

Appellant concedes the validity of the formula suggested for calculation of damages: the difference between what Rosenberg paid for raisins furnished to CCC and what Rosenberg would have paid had there been no government interference. But Appellant differs from Appellee as to the application of the formula and argues (1) that Appellee's lowest cost raisins should be used because Appellee has failed to establish any other formula for damages, and (2) that Appellee has failed to establish the level at which Rosenberg could have acquired raisins had the government not interfered. Neither of these arguments is valid.

A. ROSENBERG WOULD HAVE BEEN ABLE TO COVER ITS CCC COMMITMENTS AT $110 OR LESS PER TON HAD CCC NOT CHANGED ITS PURCHASE PROGRAM.

The trial court's findings (Findings 35, 50) that Rosenberg could have covered its CCC commitments at $110 or less but for

CCC's breach of contract is a finding of fact, supported by substantial evidence and should not be disturbed on appeal.

Dwight Grady, a well-qualified expert on raisins, testified that in the considered judgment of himself and his associates, had it not been for CCC's change in program, Rosenberg could surely have bought raisins at $110 or less to cover its CCC contracts (R. 218). While counsel for Appellant might not have agreed with Mr. Grady, there is not one scintilla of *evidence* in the record to contradict Grady's expert opinion. The Appellant's marketing expert, S. R. Smith, heard Grady's testimony but did not contradict his analysis of the raisin market. Smith himself, testified that the market did reach a level of $110 in late October (R. 500). Grady's opinion was also confirmed by the action of the raisin market. Immediately before the changes in CCC's program were announced on October 14, and at the time of Rosenberg's second offering to CCC, the market was very close to $110 per ton (R. 233; Pl. Ex. 44, p. 7; Def. Ex. K, Bulletin Nos. 399, 400). Rosenberg bought some raisins at that price (R. 233).*

At the time of Rosenberg's offer under Announcement No. 1, the raisin market had not yet been established. Bids at a level of $125 were for early season deliveries. 1947 crop raisins were not yet made, and the volume of trading was small (Def. Ex. K). The best possible indication of the market was the bid of Sun Maid under Announcement No. 1. Sun Maid, a grower cooperative, offered 10,000 tons of raisins to CCC at $153.32 per ton (Pl. Ex. 54). Using the "spread" between processed and natural condition raisins of $40 per ton (Finding 23), this bid reflected a field price of approximately $113 per ton. The fact that the market had declined to $110 or less per ton at the time of the second CCC call is bolstered by packer bids at that time (Pl. Ex. 54). The high bid (Rosenberg's) was $149.40, reflecting a grower price of

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*Appellant misquotes Grady when it alleges he stated Rosenberg was unable to buy at $110 per ton (App. Op. Br. p. 77).

$109.40 per ton. The low bid reflected a grower price of $102.56 per ton, and Sun Maid's bid, again for 10,000 tons, reflected a grower return of $105.48 per ton. Sun Maid's bids are entitled to great weight since they represent a *grower* estimate of market conditions on a very substantial tonnage. In the light of these bids, Grady's testimony was, if anything, a conservative estimate of the situation.

Rosenberg's failure to close raisin purchase contracts at the market levels prevailing in September and early October was not due to its lack of efforts. Grady testified that Rosenberg buyers were constantly canvassing growers (R. 205, 639). Rosenberg did in fact acquire substantial quantities of raisins during the latter part of this period on open contract (Def. Ex. AC).

B. THE CHANGES IN CCC'S RAISIN PURCHASE PROGRAM WHICH APPELLANT HAS ASSIGNED AS BREACHES OF CONTRACT FORCED THE RAISIN MARKET UP TO LEVELS OF $130-$135 PER TON.

The trial court's finding that CCC's breach of contract was the proximate cause of the additional cost to Rosenberg of raisins acquired for its CCC contracts (Findings 34, 43) is supported by substantial evidence and should not be disturbed on appeal.

Out of the mouths of the Department of Agriculture's own experts comes *uncontradicted* evidence that the changes in CCC's 1947 raisin program forced the natural condition raisin market upward, first to a level so unreasonably high that CCC rejected all grower bids,* and then to a level still substantially in excess of $110 per ton. The market stabilized at $135 per ton in late November and remained at $130-$135 until it broke in January, 1948 (Pl. Ex. 44, p. 55).

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*In its announcement of November 26, 1947 (Pl. Ex. 24), CCC rejected all grower bids made pursuant to its October 14 invitation to growers to enter bids. The rejection was based on the fact that grower bids all exceeded $135 per ton. The District Court's reference to "abnormally and artificially high levels" (R. 79) criticized by Appellant (App. Op. Br. p. 81, note) is undoubtedly based on this action of CCC.

The Annual Summary of Market Conditions published jointly by the U. S. Department of Agriculture and the California State Department of Agriculture (Pl. Ex. 44) summarizes conditions in the following words:

> "The Governmental announcement October 14 of the intended purchase of an additional 60,000 tons of Thompsons introduced the second phase and changed the supply picture abruptly to make available quantities appear in line with minimum trade needs. Demand for grower crops increased sharply as packers sought to cover previous sales and accumulate stocks. Growers turned strong holders, partly under strong urging by grower groups and partly in expectation of selling direct to CCC at higher prices. Grower bid forms became available November 5 and a large tonnage offered to CCC was removed from possibility of packer purchase until rejection of those bids November 26. Between October 15 and November 5 there was very little trading between growers and packers although prices had worked up to $135.00 per ton. Sales by commercial packers to the distributing trade were largely stalemated in this period by inability to obtain supplies to offer. Moderate grower selling started November 5, at $135.00 and heavy sales were made the next two or three days when packer offers were jumped to $140.00. Growers also sold freely a few days later when packers offered $135.00 for a couple of days. Heavy sales at the $140.00 and $135.00 prices included both previously uncommitted lots and closing of a majority of the outstanding open price contracts.
>
> "The change in the governmental program announced November 26 to require payment to growers of $135.00 per ton for raisins for future sale to CCC plus purchases by this agency November 26 as high as $175.00 for processed raisins put packers back in the field market actively just after Thanksgiving at $135.00 * * *."

The fact that the Federal State Market Reports (Def. Ex. K) discloses no appreciable rise in price after the October 14 an-

nouncement until October 30 does not detract from the finding of the trial court that the changed program was responsible for the rise. The immediate effect of the announcement was to bring trading to a standstill, and no significant volume was sold (Def. Ex. K, Bulletin Nos. 401-402). Growers were not inclined to sell to packers in view of CCC's impending purchase directly from them (Pl. Ex. 50, p. 2). When trading did resume, it was at substantially higher levels (Def. Ex. S). The packers' demand to fulfill their commercial orders was the direct result of CCC's changed program. Packers' commercial sales had not increased. It was CCC's removal of 60,000 tons from the *supply* side of the market which stimulated packer demand. (The language quoted above from Pl. Ex. 44 demonstrates this fact.)*

The November 26 announcement of the Department of Agriculture (Pl. Ex. 24) indicating that grower bids over $135 were excessive, and requiring certification by packers that they had paid growers $135 per ton on future sales to CCC, helped to stabilize the field market at $135 per ton, and active trading, commenced at that figure (Def. Ex. S, Bulletin No. 407). This affected the whole raisin market, not merely the limited future offerings to CCC. Grady testified that the volume of CCC's call was such that it supported the whole market price (R. 251-252). Even though November 26 was a date near the end of the period originally fixed for deliveries under Contract 1647, CCC is nevertheless responsible for the effect of its announcement on that day. Its action of October 14 had substantially hindered the packers in their attempts to cover their CCC contracts, since it reduced the supply of raisins, and growers offered raisins to CCC rather than to packers until all grower bids were rejected on November 26.

*Appellant attempts to support its argument that seasonal demand of packers, rather than the changes in CCC's program, caused the rise in price by reference to the market price for other varieties of grapes (App. Op. Br. p. 79, note), but this argument is mere speculation, and it refutes itself when the prices for Sultanas and Zantes are examined.

CCC was responsible for Rosenberg's inability to cover its commitments to CCC and to deliver in accordance with its original delivery schedule. Its action of November 26 damaged Rosenberg because it was consequently in a short position on that day.

When Appellant speculates that grower resistance, rather than CCC's additional purchases, maintained prices at high levels (App. Op. Br. p. 80), it ignores the fact that the trial court found otherwise. This is a finding on a matter of fact, and is sustained by the level of the market *before* the increase in CCC's purchase, as well as by Grady's testimony that there was a large surplus and even Setrakian could not change the laws of supply and demand (R. 204). The District Court evidently believed this evidence and ruled against Appellant's contention. Its finding of fact cannot be disturbed on appeal.

C. ROSENBERG'S BUSINESS PRACTICES AND OTHER EVIDENCE ESTABLISH THE PRICE AT WHICH ROSENBERG COSTED RAISINS TO COVER ITS CCC COMMITMENTS.

Rosenberg purchased Thompson seedless raisins on both open and closed contracts. The latter type of purchases are at a fixed price. Open contract purchases may be closed, at the option of the seller-grower, at any time when Rosenberg is buying at the price Rosenberg is then offering. If not closed by a certain date, such contracts, by their terms, are closed at the market price ruling seven days after their terminal dates. Both open and closed contracts immediately passed title to Rosenberg. Under either type of contract, once raisins were made, Rosenberg could, at its own convenience, take possession of its purchases, since producers bore the risk of loss on undelivered fruit and were ready to deliver at any time (Finding 46; Pl. Ex. 52).

Raisins are fungible goods (Finding 45) and specific *physical* lots of raisins cannot be allocated to specific *shipments* under sales contracts. The problem of costing the raisins *sold* to CCC is

not however one of physical identification of raisins *shipped.* It is an accounting problem solved by reference to Rosenberg's business practices. Dwight Grady testified that Rosenberg's business practice was to "buy raisins as it sold" (R. 338-340), and that its practice was to "acquire raisins to meet its commitments at the time we have commitments." He also stated: "When we make a sale we try to buy raisins to cover that sale * * *. The way to minimize any risk is to buy as rapidly as you can to cover your commitments" (R. 251). These statements taken together with Rosenberg's method of keeping its "trading bible", i.e., entering purchases as contracts were closed and sales as the sales contracts became firm (R. 322-323, 332) demonstrates that Rosenberg's business practice was to cost raisins sold on a *first-in first-out basis.*

The fact that Rosenberg regarded its CCC sales as firm commitments is evidenced both by the fact that it prepared sales tags (Def. Ex. C) for its CCC sales on or about the dates its offers were accepted,* and by the record of its raisin purchases in 1947.

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*Appellant's hopeful speculation that Rosenberg did not treat its CCC contracts as firm sales until January, 1948, because they were not entered in the body of the trading bible is contradicted by the record. The trading book was neither a book of original entry, nor an accurate record. It aimed only at substantial accuracy to present an overall picture. The original entries were made on sales tags (Def. Ex. C) at or about the date Rosenberg's offers to CCC were accepted. These sales tags were shown to Mrs. McIntosh, who kept the sales book, on or about the date they bear (R. 327). She did not enter them on account of Mr. Oppenheimer's instructions (R. 328), but he also told her not to enter a sales tag covering a third sale of 2,000 tons of raisins to CCC about which there never was any controversy (R. 329). Mrs. McIntosh had no reason to believe Oppenheimer would forget such large sales (R. 331). In fact, Oppenheimer told Mrs. Chase, at or about the date of the sales tags, "to keep the CCC sales in mind" when figuring the company's long or short position (R. 332). Entries were even made in the margin of the trading bible so that these sales would not be overlooked (R. 330). Probably the only reason Rosenberg did not enter the CCC sales in the body of the book (which showed an average price on sales) was Rosenberg's effort to *renegotiate price.* When that effort failed, Rosenberg decided to ship and claim its damages for breach of contract. At that time the CCC sales were entered in the body of the trading book.

It should be remembered that Rosenberg was bound to accept all raisins which it acquired under open contract as well as those which it acquired at fixed prices.

The record of its acquisitions under open *and* closed contracts demonstrates that Rosenberg bought raisins at a far greater rate than would have been necessary to meet its civilian sales commitments (Def. Ex. AC, Col. 20). Thus, by mid-October, Rosenberg had acquired title to and was bound to accept delivery on 50% of its entire 1947 acquisitions (Def. Ex. AC, Col. 10). By November 25, 1947, Rosenberg had acquired several thousand tons *more* raisins than its *total* civilian sales to date, and had enough raisins under open and closed contract to cover almost all its civilian sales (including those made at a later date) for the *entire* crop year (Def. Ex. AC, Col. 10, 18). By December 12, 1947, the date on which the District Court stated Rosenberg commenced acquiring raisins for its CCC contracts (R. 63, 65), Rosenberg already had thousands of tons *more* raisins under purchase contract than its *total* civilian sales for the *entire* year (Def. Ex. AC, Col. 10, 18). The trial court's premise in commencing, on December 12, 1947, to *cost* the raisins delivered to CCC was that Rosenberg did not begin to *acquire* raisins for its CCC contracts until that date. Its error is obvious. The record of Rosenberg's actual purchases shows that the raisins acquired for Rosenberg's CCC contracts must be costed commencing with an earlier date.

There is uncontradicted evidence in the record that Rosenberg had in fact *acquired* and *costed* its raisins for the CCC contracts by the end of January, 1948. On January 22, 1948, Rosenberg wrote CCC that it was "now in a position to make deliveries" on its CCC contracts (Pl. Ex. 30), indicating that it had acquired the raisins for CCC by that date.

On February 4, 1948, Dwight Grady wrote Cummings that Rosenberg did not dare refuse CCC's shipping notices because of the danger "we might wind up with the raisins still on our hands" (Def. Ex. D). This indicates raisins for CCC were *in Rosenberg's hands* by that date.

The reference to $133.60 in Allmendinger's notes of his conversations with Grady dated January 27, 1948 (Def. Ex. U), was probably occasioned by Grady's reference to the cost of the raisins acquired for the CCC contracts. Allmendinger's recollection was that the figure "$133.60" referred either to the price at which Rosenberg had covered or at which it would have to cover its CCC commitments. When Allmendinger was reminded that on January 27, the date of the conversation to which his notes referred, the raisin market stood at a level far below $133.60, he reluctantly admitted that if he were trying to reconstruct the conversation the more logical interpretation of the figure would be that *Rosenberg had already covered its CCC commitment at that price* (R. 606, 625-626).

On January 23, 1948, Grady wrote Downey that Rosenberg's loss in fulfilling its contracts to deliver 14,330 tons of raisins to CCC would be in excess of $315,000 (Pl. Ex. 31). The closeness of this figure to Appellee's calculation of damage on a first-in first-out basis* is not mere coincidence. It evidences the fact that Rosenberg did in fact *cost* the raisins it furnished to CCC on a first-in first-out basis. Grady's conversation with Allmendinger confirms this fact. It is also worthy of note that all of the above communications were written within a few days of the date (January 20-26, 1948) on which Appellee's calculation shows such acquisitions were completed and costed (Appendix A). This evidence as to Rosenberg's actual business practices *at the time when its loss occurred* requires that the raisins furnished to CCC be costed on a first-in first-out basis in calculating Rosenberg's damages.

There is ample legal precedent for costing the raisins on a first-in first-out basis. The first-in first-out rule has often been applied to similar situations. It is used in the absence of any other method

*The calculation of Rosenberg's loss on this basis is attached as Appendix A to this brief.

of identication to determine the cost basis of stock sold for federal income tax purposes.

Perkins v. U. S. Ct. of Claims (E.D.N.Y. 1935), 12 Fed. Supp. 481, *cert. den.* (1936) 297 U.S. 710, 80 L.Ed. 999;
Vawter v. Commissioner (C.C.A. 10, 1936), 83 F.2d 11, *cert. den.* (1936) 299 U.S. 578, 81 L.Ed. 426;
Helvering v. Campbell (1941), 313 U.S. 15, 85 L.Ed. 1159, *rehg. den.* (1941) 313 U.S. 598, 85 L.Ed. 1551.

In the field of trusts, in the absence of evidence of any particular method of allocation, the first-in first-out rule is used to determine the order of withdrawals and to trace the disposition of trust funds where there has been commingling of trust assets.

In re Hallett's Estate, 13 Ch. Div. 696;
Empire State Surety Co. v. Carroll Co. (C.C.A. 8, 1912), 194 Fed. 593.

The same principle is used, in the absence of other evidence indicating a method of allocation, in the case of payments out of a fund or bank account which is insufficient to cover all disbursements,

Clayton's Case (1816), 1 Meriv. 572;
Lowden v. Northwestern Nat. Bank & Trust Co. (C.C.A. 8, 1936), 84 F.2d 847, *cert. den.* (1936) 299 U.S. 583, 81 L.Ed. 430, *mod. den.* (C.C.A. 8, 1936), 86 F.2d 376;
Heine v. Degen (Ill. 1935), 199 N.E. 832;
In re Hotel Martin Co. (C.C.A. 2, 1936), 83 F.2d 231;
Fischbach & Moore v. Philadelphia Nat. Bank (Pa. 1939), 3 A.2d 1011.

and in case of payments by a debtor which are not allocated and which are equally applicable to two or more obligations.

Calif. Civ. Code, § 1479(3);
70 C.J.S., *Payment* § 72.

A fortiori, the first-in first-out rule should be used in the instant case because of the affirmative evidence showing it was *actually used* by Rosenberg in costing the raisins furnished to CCC. It is peculiarly appropriate because of the nature of the business. Raisins are a semi-perishable product, and in the normal course of operations, a raisin packer would dispose of his oldest goods first in order to minimize spoilage and shrinkage and to sell raisins while they retain their best appearance.

Even if the court is of the opinion that Rosenberg has not established its business practice of costing raisins on a first-in first-out basis, there is uncontradicted evidence that raisins for the CCC contract were acquired and costed before January 26, 1948. Under such circumstances, the court should have used the average cost of raisins acquired under closed contract through that date.*

Appellant's "minimum cost" theory (App. Op. Br. pp. 75-76) does not apply in this case. The cases which Appellant cites to support it are far different from the case here on appeal. Neither *Jones Appeal,* 62 Pa. 324, nor *U. S. v. Northern Pacific Ry. Co.* (D. Minn.), 116 Fed Supp. 277, dealt with fungible goods or a situation like the one before this court, where there is a logical method, actually used, to cost the raisins in question. The problem in *Jones Appeal* was the value, in a breach of contract action, of an annuity of $1,500 for life, which was to be reduced to $500 if the beneficiary remarried. The court fixed the present value of the annuity on the basis of a $500 annual income because it had *no method* of determining in advance whether the plaintiff would remarry. The issue in the *Northern Pacific* case was the value of potatoes lost in transit by a common carrier. The court selected the price fixed in a contract of sale with the consignee, rather than market value, as the measure of the consignor's damages, on the theory that the measure chosen would *fully compensate* the consignor even though the market price was higher.

*A calculation of Rosenberg's loss on this basis is attached as Appendix B to this brief.

CONCLUSION

Appellant's statement about the equities of this case is an amazing interpretation of the facts in the record. Appellant states that CCC's 1947 raisin program was designed to stimulate purchases and stabilize prices at a level not ruinous to the grower. Yet it left a known 40,000 ton surplus overhanging the market, and it called for *competitive* bidding; CCC summarily rejected the criticisms and suggestions of Rosenberg and other packers to stabilize and improve grower returns; CCC awarded contracts to the *lowest* bidders and called for bidding in two stages so that the competition was even keener on the second call; CCC refused to release the low bidders from their contracts though Rosenberg offered to release growers who had sold at less than $140 per ton; and CCC refused to make any adjustment though its change of program "put a squeeze on the processors."

It is even more surprising that upon such facts, Secretary Anderson should bear such malice toward the packers and should accuse them of "ganging up on the growers" and "trying to gut the people", and state that he was "trying to teach the packers a lesson", that they "could not buck a four billion dollar corporation" (R. 243-244; 306-309; 447). It is equally amazing that counsel for Appellant in its brief should accuse Rosenberg of failing to cooperate and "beating down the price." Sun Maid, a grower cooperative, bid at the same level as Rosenberg and other packers, and it is inconceivable that it would try to "beat down the price" or "gut" its own members. Rosenberg's use of open price contracts early in the 1947 season resulted not from its own reluctance to buy and its alleged desire to "wreck the program", but from grower resistance to selling, in large part engendered by CCC's own conduct. CCC itself rejected grower offerings at the level at which Rosenberg refused to buy.

The faults and economic deficiencies of CCC's 1947 raisin purchase program as announced on September 5, 1947, were CCC's own. The record establishes that Rosenberg realized these deficiencies and at the very beginning offered constructive criticisms and suggestions for improvement of the program. When its criticisms and suggestions were rejected and it was solicited to cooperate to make the program "as announced" a success, Rosenberg, in the belief that no changes would be made, in good faith, offered raisins to CCC on the basis of CCC's original purchase program. It bid at approximately the same level as all the other packers whose bids were accepted. When CCC violated its implied contract not to hinder or render Rosenberg's performance more expensive by announcing a changed program on October 14th, Rosenberg immediately requested cancellation of its commitments and in turn offered to release growers under firm commitment to sell raisins to Rosenberg at less than $140 per ton. This would have enabled the growers to participate in the benefits of the changed program. Acceptance of this recommendation would have assured producers an adequate return for their raisins and would have relieved packers from the inequitable losses caused by CCC's changes of program. Upon receipt of this request, S. R. Smith recommended renegotiation of prices in the packer contracts with CCC. This recommendation was made by a conscienscious and conservative public servant. Nevertheless, it was rejected by the Board of Directors of CCC acting under the leadership of Secretary Anderson. The equitable nature of Rosenberg's claim was apparently overriden by a sense of self-justification and an over-exaggerated desire to protect the reputations of the public officials responsible for the packers' dilemma.

Law, as well as equity requires a decision in favor of Appellee. Appellant cannot hide behind the cloak of sovereignty to escape liability for CCC's contractual acts. CCC's conduct unquestionably violated its implied contract not to hinder or render more expen-

sive Rosenberg's performance of its executory contracts to sell raisins to CCC. Appellant has not waived its rights, but has continuously and persistently pursued them. Finally, Appellee has established its damages, and this honorable court should correct the error of the District Court and grant Appellee the damages to which the evidence shows it is entitled.

Dated May 17, 1956.

Respectfully submitted,

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(Appendix Follows)

Appendix A

CALCULATION OF APPELLEE'S LOSS ON FIRST-IN FIRST-OUT BASIS*

(A) Cost of raisins to cover CCC Contract 1647 (10,000 tons)

Civilian sales commitments on 1947 crop raisins prior to 9/23/47 (date of Contract 1647)	7,224.56 tons†
Quantity of natural condition raisins costed to cover pre-9/23/47 civilian commitments	7,685.70 tons‡
Period during which costing of pre-9/23/47 civilian commitments completed	11/4 - 11/10/47

Raisins costed to cover CCC Contract 1647:

Period ending	*Tonnage*	*Average price per ton*	*Cost*
11/10/47	1,016.89	$142.02	$144,418.72
11/17/47	4,931.98	135.34	667,494.17
11/24/47	1,111.67	128.54	142,894.06
12/1/47	3,577.76	133.66	478,203.40
Total	10,638.30‡		$1,433,010.35

(B) Cost of raisins to cover CCC Contract 1893 (4,330 tons)

Civilian sales commitments on 1947 crop raisins prior to 10/13/47 (date of Contract 1893) plus commitment under CCC Contract 1647	20,185.55 tons†
Quantity of natural condition raisins costed to meet pre-10/13/47 civilian commitments and commitment under CCC Contract 1647	21,473.99 tons‡
Period during which costing of above completed	12/9 - 12/15/47

Raisins costed to cover CCC Contract 1893:

Period ending	*Tonnage*	*Average price per ton*	*Cost*
12/15/47	19.95	$128.44	$2,562.38
12/22/47	2,045.76	128.90	263,698.46
12/30/47	615.05	119.42	73,449.27
1/5/48	340.54	122.40	41,682.10
1/12/48	1,090.72	117.00	127,614.24
1/19/48	437.53	112.86	49,379.64
1/26/48	56.83	109.04	6,196.74
Total	4,606.38‡		$564,582.83

*Based on Pl. Ex. 45, 46, 53.

†Includes export sales (Pl. Ex. 53) and domestic sales (Pl. Ex. 47).

‡A 6% shrinkage factor has been used to convert natural condition tonnage to processed weight. (Processed weight ÷ .94 = natural condition tonnage.)

(C) Calculation of loss

Raisins costed to cover:

CCC Contract 1647..........	10,638.30 tons	$1,433,010.35
CCC Contract 1893..........	4,606.38 tons	564,582.83
Total cost..........	15,244.68 tons	$1,997,593.18

Less cost of 15,244.68 tons of natural condition raisins at $110.00 per ton*.........	1,676,914.80
Loss on CCC Contracts.........	$320,678.38

*The District Court found that had it not been for CCC's change in program in October and November, 1947, Appellee would have been able to cover the CCC commitments at $110.00 per ton (Finding 24, 35).

Appendix B

CALCULATION OF APPELLEE'S LOSS ON BASIS OF AVERAGE COST OF RAISINS 9/23/47 - 1/26/48*

Tonnage acquired 9/23/47-1/26/48	*Value*	*Average cost per ton*
23,641.35 tons	$3,111,550.64	$131.61

Cost of 15,244.68 tons of raisins† at $131.61 per ton........	$2,006,352.33
Less cost of 15,244.68 tons of raisins at $110.00 per ton⁑........	1,676,914.80
Loss on CCC Contracts........	$329,437.53

*This appendix is prepared from data contained in Pl. Ex. 46. These dates have been chosen because Rosenberg's first offer to CCC (Contract 1647) was accepted on 9/23/47, and because 1/26/46 is the end of the period on Plaintiffs Exhibit 46 during which Appellee informed CCC that it had acquired the raisins to cover its CCC commitments.

†14,330 tons of processed raisins were included in Contracts 1647 and 1893. On the basis of a 6% shrinkage factor, 15,244.68 tons of natural condition raisins are required to produce this tonnage.

⁑The District Court found that had it not been for CCC's changes in program in October and November, 1947, Appellee would have been able to cover its CCC commitments at $110.00 per ton (Findings 24, 35).